(10)

FILED
JUN 23 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

Nos. 200-201

PIERRE S. Du PONT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JOHN J. RASKOB, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Specification of Errors to be Urged	13
Reasons for Granting the Writs	14
Conclusion	19

CITATIONS

Cases: PAGE

Anderson v. Helvering, 310 U. S. 404..... 18

City Bank Farmers Trust Co., Trustee (Duke) v. Helvering, 61 Sup. Ct. 896..... 18

Commissioner v. Peterman, 118 F. (2) 973.... 16, 17

Deputy v. Du Pont, 308 U. S. 488..... 17

Ford Motor Co. v. Beauchamp, 308 U. S. 331.. 17

Griffiths v. Commissioner, 308 U. S. 355..... 17

Helvering v. Bruun, 309 U. S. 461..... 17

Helvering v. F. & R. Lazarus Co., 308 U. S. 252 18

Helvering v. Horst, 311 U. S. 112..... 17

Helvering v. Johnson, 308 U. S. 523, affirming (C. C. A. 8) 104 F. (2) 140..... 16, 17

Helvering v. Leonard, 309 U. S. 644..... 17

Helvering v. Price, 309 U. S. 409..... 18

Harrison v. Schaffner, 61 Sup. Ct. 759..... 17

Higgins v. Commissioner, 312 U. S. 212..... 17

Higgins v. Smith, 308 U. S. 473.....17, 18, 19

Neuberger v. Commissioner, 311 U. S. 83..... 17

Pearson v. McGraw, 308 U. S. 313..... 17

R. F. C. v. Prudence Group, 311 U. S. 579..... 17

United States v. Pyne, 61 Sup. Ct. 893..... 18

United States v. Spalding, 115 F. (2) 54....15, 16, 17

United States v. U. S. F. & G. Co., 309 U. S. 506 17

Statutes:

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23 3

Sec. 118 3–4

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

Nos.

PIERRE S. DU PONT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JOHN J. RASKOB, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled causes on March 6, 1941 and made final when petitions for rehearing were denied on March 31, 1941.

Opinions Below

The opinions of the Board of Tax Appeals (6 R. 1-103[1]) are reported in 37 B. T. A. 1198 and 1283. The opinion of the Circuit Court of Appeals (6 R. 251-259) is reported in 118 F. (2) 544.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered March 6, 1941 (6 R. 259-260). Petitions for rehearing were filed by both Petitioners on March 19, 1941[2] (6 R. 260, 262). These petitions were denied March 31, 1941 (6 R. 268). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the taxpayers sustained deductible losses on sales of securities to each other on November 13, 1929.

2. Whether the taxpayers sustained deductible losses on sales of securities to each other on December 26, 1929.

3. Whether petitioner, Raskob, realized taxable profits on the disposition of part of the securities purchased from Du Pont on November 13, 1929 (including the question of Raskob's cost basis for such securities).

---

[1] The records in the two cases have been printed together as a single record. It consists of six volumes. The numerals preceding the letter "R" indicate the volume number.

[2] Rule 35 of the Rules of the Third Circuit Court of Appeals provides that a petition for rehearing must be filed within fifteen days after the entry of judgment. In these cases the petitions for rehearing were filed thirteen days after the entry of the judgments.

Statutes Involved

Revenue Act of 1928, c. 852, 45 Stat. 791:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

* * * * *

(h) *Loss on sale of stock or securities.*—For disallowance of loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or

securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed."

Statement

The facts, as found by the Board of Tax Appeals (6 R. 4-45), may be summarized as follows:[3]

In 1929 Du Pont realized large profits on the sale of securities (4 R. 267). In October 1929 the stock market crashed (6 R. 4). Du Pont actively aided in efforts made to prevent complete demoralization (3 R. 872, 875). To this end he expended about $20,000,000 purchasing stocks and taking up accounts (6 R. 5). In November 1929 Du Pont held a large amount of securities which showed losses (6 R. 6, 42). He was desirous of offsetting his losses against his previously realized profits (6 R. 6).

Du Pont and Raskob were close friends and had been intimately associated together in business and social life for many years (6 R. 4). On November 12, 1929 Du Pont told Raskob he wanted to sell securities to realize his losses but he did not wish to sell large quantities of stock in a market just recovering from a panicky condition which he was and was known to be supporting. Raskob told Du Pont that he also had securities to sell to establish losses and that he would take Du Pont's stock provided he could sell a somewhat similar amount (6 R. 6).

On November 13, 1929 Du Pont sold to Raskob blocks of five different stocks for $4,582,750 and Raskob sold to Du Pont blocks of seven different stocks for $4,606,000 (6 R. 6, 7). All the securities were listed on exchanges

[3] For purposes of clarity, references are made to a few minor details not included in the Board's findings but about which there is no question.

and the prices were within the market of the day (6 R. 7, 8). The parties gave each other checks for the purchase prices. The checks were deposited together at a bank where both had accounts. (6 R. 9.) The stock certificates were delivered to each other and were transferred into their respective names, stock transfer taxes being duly paid (6 R. 10, 41). The transactions were regularly entered on the books of account of the taxpayers as sales and purchases of stock (6 R. 10).

Included in the stocks bought by Raskob from Du Pont were 56,500 shares of General Motors. In 1929 Raskob sold part of this stock to a corporation owned by his wife and he used the balance to cover a short sale previously made through a broker. These transactions showed a profit of $201,256.40. Raskob reported this profit in his return for 1929. No adjustment has been made with respect to this profit and Raskob has been taxed thereon. Du Pont knew nothing of these transactions until 1937. (6 R. 13, 14.)

On December 26, 1929 Du Pont told Raskob that he wished to sell 40,000 shares of Warner Brothers stock but did not wish to dump such a large block on the Exchange at that time (6 R. 21; 3 R. 666-668, 715, 900). Raskob said he would be glad to buy the stock but that he would have to sell some securities to raise funds for the purchase. He offered Du Pont 5,000 shares of Baltimore & Ohio and 14,000 shares of Anaconda Copper and Du Pont agreed to purchase them. (6 R. 21.)

Du Pont sold the Warner stock for $1,560,000 and Raskob sold the B. & O. and Anaconda for $1,569,000 (6 R. 21, 22). These prices were based on the stock market prices of the day (6 R. 23). The parties gave each other checks for the purchase prices. The checks were mailed together to the bank. (6 R. 23.) The stock certificates were delivered to each other and were transferred into their respective names, stock transfer taxes being duly paid (6 R. 23, 41; 4 R. 199, 225). The transactions were regularly entered on the books of account of the taxpayers as sales and purchases of stock (6 R. 24).

On January 3, 1930 Raskob deposited with a bank, as collateral security for a loan to him, the Warner stock which he bought from Du Pont on December 26, 1929. This stock remained with the bank as security for Raskob's loan until June 13, 1930. Du Pont was unaware of this use of the securities.[4] (6 R. 19, 25.)

After the stock market crash in October 1929 Du Pont rendered financial assistance and gave advice to various persons in distress (6 R. 30-32). These people held substantial amounts of Warner stock (6 R. 31, 32). Du Pont told these people he was holding his Warner stock[5] (6 R. 32).

On January 3, 1930 Du Pont and Raskob discussed with each other the resale of the securities bought from each other on November 13, 1929 (6 R. 14, 15), including the 100,000 shares of Warner bought by Du Pont from Raskob (6 R. 7) which was substantially all the Warner stock Du Pont then held (6 R. 32).[6]

---

[4] It will be noted that Raskob sold to and pledged with others almost 60% in value of the stocks which he bought from Du Pont, all without the latter's knowledge or consent (6 R. 6, 13, 14, 19, 21, 25).

[5] On November 13, 1929 Du Pont bought 100,000 shares of Warner from Raskob (6 R. 7). Before that date he had acquired 40,000 shares, which he sold to Raskob on December 26, 1929 (6 R. 21) so that at the beginning of 1930 Du Pont held 100,000 shares (6 R. 32).

[6] According to the testimony of Du Pont and Raskob, Du Pont was willing to sell the 100,000 shares of Warner and the other stocks purchased from Raskob on November 13, 1929, but was concerned over the fact that if he did so he would hold no Warner stock. The people whom he was assisting and who were relying on him held a substantial amount of the stock. He had talked with all of these people, knew approximately their holdings in Warner stock and had told them that he was holding his stock. His concern was that if now he should sell out all of his personal holdings, he was in a way going back on them, and if thereafter the market price should drop, he would be embarrassed by having protected himself

On January 3, 1930 arrangements were made for a short sale of Warner stock by Du Pont to Raskob of 25,000 to 30,000 shares, the exact amount to be determined later (6 R. 33). Raskob executed a 6% demand note, dated January 3, 1930, payable to Du Pont, with the amount blank, and left it with his secretary with instructions to fill in the amount, computed at the rate of $40 per share, the then market value, upon being informed by Du Pont's secretary of the number of shares Du Pont would sell. On January 6, 1930 Du Pont's secretary advised that the transaction would be for 27,000 shares,[7] the note was filled in accordingly and was delivered (6 R. 33), together with a letter from Raskob confirming the transaction (6 R. 34). The transaction was regularly entered on Du Pont's books as a short sale (6 R. 34).[8]

---

without having protected them. (3 R. 715, 724, 904, 905, 945-947, 1066.) Du Pont did not know the exact amount of Warner holdings of those whom he was helping and those who were relying on him, but he estimated it to be somewhere approaching 30,000 shares, probably 25,000 or 26,000 shares. (3 R. 716, 905, 1066, 1067.) Accordingly, it was agreed that Raskob would purchase 25,000 to 30,000 shares in addition to the 100,000 shares, the amount in excess of 100,000 shares to be sold "short" by Du Pont and to cover the stock held by others whom he was assisting and who were relying on him. (3 R. 715, 716, 904, 905.) Du Pont's thought was that if the market price of the Warner stock should go down, he would offer to those whom he was assisting the opportunity to participate in the short sale, and if the market price should go up, it would be in connection with a general advance in the market and he would profit so greatly on other securities which he held that he could well afford the loss on the short sale. (3 R. 1065-1067.)

[7] Du Pont testified the number of shares was made up of 20,000 shares held by corporations owned by relatives, 4,350 shares held in brokerage accounts of a departmental official of the Du Pont Company and accounts guaranteed by him, and approximately 2,000 shares held by three friends (3 R. 724, 725, 819-830). He testified he may or may not have included 1,000 shares held in a thrift account maintained by him for his employees (3 R. 725).

[8] And was similarly entered on Raskob's records (4 R. 143, 145, 157).

Also on January 6, 1930, Du Pont and Raskob each sold to the other, at their then market values, the same amounts of securities bought from each other on November 13, 1929 (6 R. 15-18). The selling price of the securities sold by Raskob was $5,254,125 and the selling price of the securities sold by Du Pont was $5,989,500 (6 R. 16). At Raskob's request, Du Pont consented to accept Raskob's 6% demand note for $700,000 in part payment of the purchase price of the stocks bought by Raskob, and Raskob delivered to Du Pont his check for $5,289,000 in payment of the balance. Du Pont delivered to Raskob a check for $5,254,125 to cover the stocks bought from Raskob, and the two checks were sent to the bank together (6 R. 18, 19). The stock certificates were delivered to each other and were transferred into their respective names (6 R. 18, 19). Du Pont delivered to Raskob the stock certificates reissued in Du Pont's name for the stock certificates received from Raskob on the purchases of November 13, 1929 and Raskob did likewise as to the 87,400 shares purchased from Du Pont (6 R. 6) except as to 56,500 of those shares (6 R. 39, 20). Stock transfer taxes were duly paid (6 R. 41), and the transactions were regularly entered on the books of account of the taxpayers (6 R. 20).

On January 13, 1930 Raskob went to Florida (6 R. 25). Before leaving he signed two checks payable to the order of Du Pont with the dates and amounts blank. At the same time he wrote two letters to Du Pont, one confirming the sale of 40,000 shares of Warner and the other confirming the purchase of 14,000 shares of Anaconda and 5,000 shares of B. & O. (the amounts of these stocks involved in the transactions of December 26, 1929). The purchase and sale prices in the letters were left blank. Raskob and his secretary, Garey, alone had knowledge of the writing of these letters and checks. (6 R. 25, 26.)

After January 3, 1930 the market price of Warner stock rose steadily (6 R. 35). This meant paper loss to Du Pont

and paper profit to Raskob with respect to the 27,000 shares sold short by Du Pont to Raskob on January 3, 1930 (6 R. 80).

On Saturday morning, January 25, 1930, Raskob had a long-distance telephone conversation with Du Pont in Wilmington respecting the closing of the short sale transaction. Nothing was said during the conversation about the price for the stock (6 R. 35). On Monday morning, January 27, 1930, Raskob called his secretary, Garey, in Wilmington on long-distance, told Garey that Du Pont had agreed on January 25th to cover his short transaction in Warner, entered into on January 3, 1930, by purchasing 27,000 shares from Raskob, and that the price would be $50 per share, the price current at the time of Raskob's telephone conversation with Du Pont on January 25th (6 R. 35, 38). Raskob requested Garey to consummate the transaction on such terms (6 R. 35).

Raskob also told Garey to see Du Pont about purchasing the Warner stock sold to him by Raskob on December 26, 1929 (6 R. 26). According to the finding of the Board (6 R. 26):

> "He (Raskob) also said that it *might be possible* Du Pont would want to sell the Anaconda Copper Mining Co. and the Baltimore & Ohio Railroad Co. stocks sold by Raskob to Du Pont on December 26, and, *if so*, he was willing to buy it, and that *in case the sales were made*, to go ahead and use the checks and letters (previously prepared) * * *. He also stated that *if* Du Pont bought both blocks of Warner Brothers Pictures, Inc. stock (referring to the 40,000 shares sold December 26 and the 27,000 shares involved in the short sale transaction) he wanted to pay off his notes. He told Garey to buy and sell at current market prices as he might agree with Du Pont (as to stock sold December 26)." (Italics ours)

After his telephone conversation with Raskob, Garey went in to see Du Pont and told him about his telephone

conversation with Raskob and of the price fixed for covering the short sale of 27,000 shares of Warner (6 R. 35). Garey also took up with Du Pont the matter of purchase by Du Pont of 40,000 shares of Warner and the sale by him of 14,000 shares of Anaconda and 5,000 shares of B. & O., and Du Pont agreed to purchase and sell these securities at their then market prices (6 R. 26-29).

Garey thereupon inserted the selling prices and otherwise completed the letters confirming the sale by Raskob to Du Pont of 40,000 shares of Warner and the purchase by Raskob from Du Pont of 14,000 shares of Anaconda and 5,000 shares of B. & O., being the letters Raskob had left behind when he went to Florida (6 R. 26). Garey delivered the completed letters, certificates for the stock, and a check for transfer taxes to Du Pont (6 R. 26, 30, 41). Du Pont likewise wrote letters to Raskob confirming the transactions and delivered to Garey, acting for Raskob, certificates for the Anaconda and B. & O., and a check to cover stock transfer taxes (6 R. 28, 30, 41). The stock certificates for Anaconda and B. & O. delivered by Du Pont were the certificates reissued in his name for the certificates received from Raskob on the purchases of December 26, 1929 (6 R. 39). The stock certificates for 40,000 shares of Warner delivered by Raskob were part of the 100,000 shares reissued to Raskob for certificates received from Du Pont on the purchases of January 6, 1930 (6 R. 39, 30).

On January 27, 1930 Du Pont delivered to Garey a check to the order of Raskob for $2,020,000 in payment of the 40,000 shares of Warner. On the same day Garey inserted the date "January 27, 1930" and the amount of $1,600,000 in one of the two checks which had been signed by Raskob before he went to Florida and delivered the completed check in payment of the Anaconda and B. & O. Du Pont's bank balance was less than the difference between the two checks and, in order to meet his check to Raskob, Du Pont drew a check for $300,000 on another bank. The three checks were sent to the bank together. (6 R. 29, 30.)

The purchases and sales of January 27, 1930 were regularly entered on the books of Du Pont and Raskob (6 R. 30). The difference ($420,000) between the price of the 40,000 shares of Warner sold by Raskob and the price of the Anaconda and B. & O. purchased by him, plus the proceeds of the 27,000 shares of Warner ($1,350,000), was almost sufficient to pay off Raskob's two notes to Du Pont for $700,000 and $1,080,000 (6 R. 80). The principal of the notes, plus interest, amounted to $1,787,066.66 (6 R. 36). On January 27, 1930 Garey inserted the date "January 27, 1930" and the amount $1,787,066.66 in the second check drawn to the order of Du Pont by Raskob before he went to Florida and delivered the completed check to Du Pont in payment of the principal of and interest to January 27, 1930 on the notes. The notes were thereupon delivered to Garey (6 R. 36, 37). On January 30, 1930 Du Pont's check to Raskob for $1,350,000, the purchase price of the 27,000 shares of Warner (covering the short sale), was delivered to Garey (6 R. 37), and this check and Raskob's check for $1,787,066.66 in payment of his notes and interest were sent to the bank on January 30, 1930.

With respect to the sales made in January 1930, in his income tax return for 1930 Du Pont reported profits of $1,144,500 and Raskob reported profits of $1,138,943.80 (6 R. 43, 44). Because of the realization of losses in 1930 after January, Raskob paid no Federal income tax for that year (6 R. 44; 2 R. 252; 4 R. 205). Du Pont realized substantial losses in 1930 subsequent to January, but his Federal income tax return for that year as originally filed showed tax due of $8,180.85, which was paid (6 R. 44; 4 R. 277). In December 1932 the Commissioner proposed to determine an overassessment of the total tax paid by Du Pont for 1930, but in January 1934 he determined instead that there was a deficiency of $13,000.03, resulting from adjustments not related to the matters in question (6 R. 44). Although the statute of limitations on assess-

ment of such additional tax had run (5 R. 815) Du Pont consented to the assessment and paid the deficiency (6 R. 44).

Except where otherwise indicated, the Board has found the facts to be as stated above. The only important respect in which the taxpayers take exception to the Board's findings (other than its conclusions[9]) is as to the reason for the short sale of 27,000 shares of Warner, found by the Board to have been made by Du Pont on January 3, 1930. The Commissioner contended this transaction never occurred (6 R. 76) and on this assumption he asserted the claim in question (1 R. 47, 222). Du Pont testified the transaction was entered into by him as a hedge and for the purpose of affording a means of protecting people who were relying on him from the consequences of a falling market in Warner stock, as more fully stated in footnote 6, pages 6, 7. The Board found all of the important facts to be as represented by the taxpayers (6 R. 30-38), but then inferred the parties entered into the transaction on January 3, 1930, not for the purpose testified to by Du Pont, but for the purpose of balancing their accounts in cash at the end of the month (6 R. 73-84).

In other words, the Board concluded that when the parties on January 3rd agreed on their first repurchases (6 R. 14, 15) they ascertained they were then apart in cash about $735,000[1]; that they had agreed to repurchase at the end of January the Warner, Anaconda and B. & O. stocks sold to each other on December 26, 1929; that they wanted to be all even in cash when those repurchases were made; that they foresaw how Warner, Anaconda and B. & O. probably would fluctuate in price during the month of January; and that they then determined a short sale by Du Pont of 27,000

---

[9] Findings 53 (6 R. 30) and 75 (6 R. 45).

[1] The difference between the repurchase prices of $5,254,125 and $5,989,500 (6 R. 16).

shares,—not 25,000 or 30,000 but the odd figure of 27,000 shares,—of Warner at the then current market price, covered at a market price around the end of the month, would probably balance them out when the various transactions all were closed at the end of January.

And the parties were supposed to have made this calculation at a time when the stock market was, and for several months had been, going through the wildest days of its history, when prices were fluctuating in a manner never before thought possible, and conditions were such that it is very safe to say no one knew what was going to happen next.

We submit the Board's conclusion is insupportable.

The Circuit Court concluded it was unnecessary to decide what the reason was for the short sale transaction.[2] The decision of the Circuit Court is that the losses were not allowable irrespective of the short sale transaction and, therefore, irrespective of the alleged balancing in cash. This was the Commissioner's primary contention before the Circuit Court (although, as noted, it was not his contention when he initiated his claim [1 R. 47, 222]).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1) In holding that the sales of securities by the taxpayers to each other on November 13, 1929 were not such as to result in deductible losses.

2) In holding that the sales of securities by the taxpayers to each other on December 26, 1929 were not such as to result in deductible losses.

---

[2] Referring to the short sale and the balancing in cash the Circuit Court said:

> "This may have been a coincidence or the real purpose may have been the protection of friends and employees who had been speculating in stock sold short" (6 R. 257).

3) In failing to hold that Du Pont realized deductible losses on his sales to Raskob on November 13, 1929 and December 26, 1929 as allowed by the Commissioner before he filed his Second Amended Answer in the Du Pont case (1 R. 29).

4) In failing to hold that Raskob realized deductible losses on his sales to Du Pont on November 13, 1929 and December 26, 1929 as allowed by the Commissioner before he filed his Amended Answer in the Raskob case (1 R. 156).

5) In holding that Raskob realized taxable profits of $201,256.40 with respect to the disposition by him in 1929 of 56,500 shares of General Motors acquired from Du Pont on November 13, 1929.

6) In holding that Raskob's basis for said 56,500 shares of General Motors was the amount paid therefor by him to Du Pont.

Reasons for Granting the Writs

The Circuit Court decided these transactions did not result in "losses" within the meaning of Sec. 23 (e) (2). The Court did not decide the transactions came within Sec. 118.[3] It concluded that under Sec. 23 (e) (2), the sales did not result in losses because there was not a sufficient severance of the property from the seller. The Court found there was a "'co-existent intention'" to "repurchase" (6 R. 254), that since the parties were "sympathetic" (6 R. 255), they could assume they would be able to repurchase, and that such circumstances divested the trans-

[3] The Court said: "Congress has not seen fit to sever our particular skein. It has attempted no delimitation of good faith here." (6 R. 254.)

actions of an "incident of finality" (6 R. 253) necessary to a deductible loss.[4]

1. The interpretation of Sec. 23 (e) (2) by the Circuit Court in this case is in conflict with the interpretation of the Fifth Circuit in *United States* v. *Spalding,* 115 F. (2) 54. In the *Spalding* case a son sold land to his father in 1933. The father gave his son the right to occupy the land in consideration of paying the taxes and keeping the improvements in repair (so that the son did not part with possession). He also gave his son the option to repurchase the land at approximately the same price. The option expired upon the death of the father in a subsequent year. The Court held the son realized a deductible loss in the year of sale and not in the year the option to repurchase expired.

The *Spalding* case goes even further than this case. There the seller retained possession and legally enforceable rights to repurchase. Here the Circuit Court found no such situation. The most that can be said here is that there was such an understanding between the parties and their relationship was such as to give the seller reasonable assurance of being able to repurchase. But he had no legally enforceable rights to that end and could only hope the purchaser would resell,—a hope which might be frustrated by intervening death or bankruptcy of the purchaser, a change of mind, or what not.

The fact that in this case there was a repurchase, whereas in the *Spalding* case there was not, is immaterial. Since under the income tax law each year stands alone, the question is the degree of severance *in the taxable year* sufficient to result in deductible loss. As noted, during the taxable year there was less severance in the *Spalding*

[4] Although there was as much "finality," in a realistic sense, as in the case of the ordinary year-end tax loss sale on a stock exchange where the seller intends to and does repurchase after thirty days.

case than there was in the instant case. If the Fifth Circuit had held in the *Spalding* case the loss was realized when the option expired, the decision would have been consistent with the Third Circuit's decision here. The Fifth Circuit not having so held the cases are in conflict.

2. For like reasons the decision of the Third Circuit in this case is in conflict with the decision of the Ninth Circuit in *Commissioner* v. *Peterman,* 118 F. (2) 973. In that case real estate was sold in 1936 for non-payment of taxes. Under the local law the taxpayer had a right of redemption until some time in 1937. The Court held the loss was realized in 1936, when the property was sold, and not in 1937, when the right of redemption expired, despite the fact that until such later time there was not a complete severance of right to ownership and possession. That is, the Court held a parting with the property less complete during the taxable year than that here resulted in a deductible loss.

3. The decision here is inconsistent with the decision of affirmance by an equally divided court in *Helvering* v. *Johnson,* 308 U. S. 523, affirming (C. C. A. 8) 104 F. (2) 140. In that case the taxpayer wanted to establish a tax loss on stock. He formed a corporation, borrowed $100,000 from a bank, transferred $49,900 to his wife, $200 to a friend and kept the balance. The three paid $100,000 for the stock of the corporation, the friend endorsed his certificate to the taxpayer, and on the same day the corporation purchased the stock from the taxpayer for $240,000. The purchase price was paid $99,000 in cash and $141,000 in a note collateralized by the stock. The taxpayer paid off his bank loan with the $99,000. With the exception of the purchase of a small amount of bonds, the corporation did no business except with respect to the acquisition of this stock. The corporation's note was collateralized by the

stock so that the taxpayer retained possession. He exercised complete control over the corporation and voted the stock sold as proxy. The Board found he would not have sold the stock to a member of the public, that his intention was to continue to hold the stock, and that he had no intention of selling the stock to his wife. The Circuit Court allowed the loss. This Court affirmed by an equally divided bench. We submit this decision is clearly inconsistent and in conflict with the present case.

Such conflict and inconsistency as exist between the decision below, on the one hand, and the decisions of other Circuits and this Court in the *Spalding, Peterman* and *Johnson* cases, *supra,* on the other hand, have been recognized by this Court as grounds for granting a writ. Cf. the "alleged" and "asserted conflict" between *Griffiths* v. *Commissioner,* 308 U. S. 355 and *Higgins* v. *Smith,* 308 U. S. 473; the "asserted inconsistency" with prior decisions of the Supreme Court, considered justifying certiorari in *Deputy* v. *Du Pont,* 308 U. S. 488; the "substantial" conflict relied on in *Neuberger* v. *Commissioner,* 311 U. S. 83 and *R. F. C.* v. *Prudence Group,* 311 U. S. 579; the conflicts "in principle" cited in *Harrison* v. *Schaffner,* 61 Sup. Ct. 759, *Higgins* v. *Commissioner,* 312 U. S. 212, and *Helvering* v. *Horst,* 311 U. S. 112; the "probable conflict with the principles underlying" other decisions, mentioned in *Pearson* v. *McGraw,* 308 U. S. 313, and *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; the "probable conflict" referred to in *United States* v. *U. S. F. & G. Co.,* 309 U. S. 506, and *Helvering* v. *Leonard,* 309 U. S. 644; the "inconsistency of decisions" grounding certiorari in *Helvering* v. *Bruun,* 309 U. S. 461; the "differing interpretations" of a statutory phrase, relied on in *City Bank*

Farmers Trust Co., Trustee (Duke) v. *Helvering*, 61 Sup. Ct. 896, and *United States* v. *Pyne*, 61 Sup. Ct. 893; and similar reasons cited in *Helvering* v. *F. & R. Lazarus Co.*, 308 U. S. 252, *Helvering* v. *Price*, 309 U. S. 409, and *Anderson* v. *Helvering*, 310 U. S. 404.

---

4. The Circuit Court found that the law involved here has not been clarified by "any very satisfactory judicial" interpretation (6 R. 252). The question frequently arises and the Circuit Court found that the decisions are in "chaos" (6 R. 254).

It is submitted under such circumstances there is appropriate occasion and urgent reason for the Supreme Court to consider the matter and to endeavor to bring some order out of the chaos.

5. It has been noted that during the taxable year, with respect to the disposition of 56,500 shares of General Motors acquired from Du Pont, Raskob, on the basis of the purchase price from Du Pont, realized profits of $201,256.40 (6 R. 13, 14). The Circuit Court held Raskob was taxable on this amount of profits (6 R. 258). In other words, the Court held that Raskob had a cost for the stock of the amount paid therefor to Du Pont, although the Court simultaneously held that the sale by Du Pont did not result in a loss to him.

This raises a question which was left open by the decision of this Court in *Higgins* v. *Smith*, 308 U. S. 473. There the Court held that a sale to a wholly owned corporation did not sufficiently sever the property from the taxpayer to permit him to take a loss. If so, what is the basis to the acquiring entity? Does the amount of basis equal to the difference between cost and selling price evaporate, or does the acquiring entity take the same basis as the transferor, to whom no loss was allowed?

It is believed that, in the interest of satisfactory administration of the tax law, the uncertainty on this point, created by this Court's decision in *Higgins* v. *Smith, supra,* should be dispelled. Since the present proceeding involves this question, it is submitted for this reason also the Supreme Court should review the case.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

June 1941.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	10

CITATIONS

Cases:

Helvering v. *Mitchell*, 303 U. S. 391 9

Higgins v. *Smith*, 308 U. S. 473 8

Statute:

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23 2

Sec. 118 3

401379—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 200, 201

PIERRE S. DU PONT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

JOHN J. RASKOB, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Board of Tax Appeals (6 R. 1–103)[1] are reported in 37 B. T. A. 1198 and 1283. The opinion of the Circuit Court of Ap-

[1] The records in these two cases have been printed together, and, for the purpose of the petition for certiorari, consist of six volumes. The numerals preceding the letter "R" are here used to designate the volume number.

peals (6 R. 251–259) is reported in 118 F. (2d) 544.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 6, 1941 (6 R. 259–260), and petitions for rehearing were denied March 31, 1941 (6 R. 268). The petition for writs of certiorari was filed June 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioners duPont and Raskob purported to sell securities to each other on November 13 and December 26, 1929. In January 1930 they repurchased the securities from each other. The Board of Tax Appeals found that the transactions in November and December did not constitute real and completed sales but were consummated by mutual agreement for reacquisition of the securities, with the consequence that petitioners were not entitled to any deduction for losses in their income-tax returns. The question presented is whether the Board's finding is supported by substantial evidence.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

* * * * *

(h) *Loss on sale of stock securities.*—For disallowance or loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

* * * * *

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be

allowed under section 23 (e) (2) of this title; * * *

STATEMENT

During the year 1929, the personal income of petitioner duPont from profit on securities exceeded $36,000,000 (4 R. 274; cf. 6 R. 158), and petitioner Raskob's income, exclusive of the amount in controversy, exceeded $9,000,000 (6 R. 162, 168, 175). In order to establish losses to reduce the amount of their taxable income, petitioners on November 13, 1929, and December 26, 1929, purported to sell securities to each other, which they subsequently on January 3 and January 27, 1930, repurchased from each other. The Government contended and the Board of Tax Appeals found that these pretended sales were lacking in bona fides, that they did not possess that reality essential to sales contemplated by the statute in allowing deductions for realized losses, and that they were contrived and consummated through mutual understanding and agreement of duPont and Raskob for reacquisition of the same securities in the manner the reacquisitions actually occurred (6 R. 99).

The pivotal question is whether the Board's ultimate conclusion is founded on substantial evidence. The preliminary findings upon which the Board based its ultimate finding are extensive (6 R. 4–45), and the evidence on which those pre-

liminary findings rest is voluminous. Obviously, we cannot set forth a full statement within the compass of this brief, and therefore respectfully refer the Court to the findings themselves in Volume 6 of the record for a more complete statement. However, we will here set forth a skeleton outline of the transactions involved, which alone is more than ample to sustain the ultimate finding.

1. *The November 13 sales.*—On November 13, 1929, du Pont and Raskob purported to sell to each other securities aggregating somewhat over $4,500,000 each (6 R. 6–7). Raskob personally delivered his check to duPont's secretary with instructions not to deposit it until he had received duPont's check (6 R. 9). Thereafter, Raskob personally placed both checks and deposit slips in a single envelope and caused them to be delivered on November 15, 1929, to a receiving teller of the main office of the Bankers Trust Company, notwithstanding that Raskob's account was with the 57th Street Branch of that bank (6 R. 9). Although the balance in du Pont's account was sufficient to meet his check without previously depositing Raskob's check, the closing balance in Raskob's account on each of the days during this period was less than $40,000 (6 R. 10). The prices at which the securities were sold appear to have been arbitrarily selected, and did not have any common denominator of consistency based upon

either low, high, open, or close of the market for November 13, 1929 (6 R. 8–9, 58–66).

On January 6, 1930, petitioners repurchased from each other the identical number of units of the same securities which they had purported to sell to each other on November 13, 1929, and again the checks were transmitted together to the same bank for simultaneous deposit (6 R. 14–20).

2. *The December 26 sales.*—The petitioners had meanwhile, on December 26, 1929, purported to sell other securities to each other aggregating about $1,560,000 each (6 R. 21–24). On January 27, 1930, they repurchased those securities from each other. Prior to leaving for Florida where he remained until the end of March 1930, Raskob had on January 10, 1930, signed blank checks and wrote and signed two letters to du Pont post-dated January 27, 1930, confirming the repurchase and resale of the securities which were the subject of the December 26, 1929, transaction. These letters and checks were left in the custody of Raskob's secretary, together with a power of attorney signed in blank for the transfer of the securities (6 R. 25–28).

3. *The "short sale."*—As a result of the divergent market fluctuations of the various securities between the respective date of each of the reciprocal sales and their reversals, a substantial balance arose in du Pont's favor against Raskob. However, on January 3, 1930, both petitioners en-

tered into a rather extraordinary transaction, denominated as a "short sale" which was finally closed out late in January 1930, and as a consequence of that transaction, after adjustments were made for stamp taxes, dividends paid on the securities of each while in the hands of the other, *the ultimate cash difference between the petitioners on all their transactions aggregating over $29,000,000 was only $46.86.* (See Chart, 4 R. 389.) The details of the "short sale" transaction are too involved for concise restatement here, and we therefore refer the Court to pages 30–39 of Volume 6 of the Record for a full account.

Thus, when the "short sale" is taken in conjunction with the two sets of reciprocal sales and their reversals, it appears that both petitioners ended up with the identical securities [2] that they started out with, and that when the smoke had cleared away, they were only $46.86 apart.

The Board of Tax Appeals concluded that the so-called short sale "was intended to be what it actually resulted in, a transaction balancing in effect the accounts between the two parties" (6 R. 83, 73–84), and that (6 R. 99–100):

> Upon consideration of all the evidence, we hold that neither of the pretended sales of stocks between du Pont and Raskob was a

[2] Not only did each reacquire the identical securities sold to the other, but with only two exceptions each reacquired the identical reissued certificates (6 R. 39).

> bona fide complete disposition thereof, and did not possess that reality indispensable to sales contemplated by the statute as to deduction of realized losses, but that both were contrived and consummated through mutual understanding and agreement between the two parties for the reacquisition of the stocks originally owned by each, by the reversal of the sales in the manner in which they were reversed, agreement in the first sale inhering as a part of the original plan and transaction, and in the second sale occurring at the time of the sale or within 30 days thereafter. * * *

Accordingly, deductible losses aggregating over $5,000,000 for both petitioners (6 R. 3, 103) were disallowed (6 R. 100). The Circuit Court of Appeals affirmed.

ARGUMENT

The basic principles involved are firmly established. The deductible loss must rest upon a sale in which the taxpayer has made a final disposition of the property involved. Where the sale is made to a wholly-owned corporation, the continuing control of the sole stockholder over the property deprives the sale of finality *per se,* and the loss cannot be allowed. *Higgins* v. *Smith,* 308 U. S. 473. Where the sale is between individuals, lack of finality may be shown by proof of intention of the parties to restore the property to the vendor, or proof that the parties never intended any bona fide

disposition.[3] Cf. *Helvering* v. *Mitchell*, 303 U. S. 391.

The Board of Tax Appeals in this case found that the transfers of November 13, and December 26, 1929 did not constitute real and completed sales, but were consummated by mutual agreement for reacquisition of the securities (6 R. 45, 99–100). That finding is more than amply supported by the record. Indeed, it is so fully supported that the appeal to the court below was wholly without merit, and further review in this Court would be unwarranted.

The alleged conflicts urged by petitioners (Pet. 15–16), all involved cases where the loss had been allowed by the Board of Tax Appeals or by the District Court and in which the circuit courts of appeals had refused to disturb the dispositions below.

---

[3] Where there is a reacquisition within 30 days, the statute in effect creates an irrebuttable presumption that the sale was not intended to be final, and automatically disallows the deduction. See Section 118 of the Revenue Act of 1928, *supra*, p. 3. Here, however, the petitioners were careful to reacquire the securities shortly after the expiration of the 30-day period, and lack of finality must therefore be shown by proof of intention, agreement, or understanding of the parties. But even where the repurchase occurs after the 30-day period, Section 118 is applicable if there was an agreement for repurchase arrived at within the 30-day period, and the ultimate finding of the Board (6 R. 99–100) that there was such an agreement or understanding here supports the application of Section 118. Thus the existence of such agreement forbids the deduction under Section 23 (e) and calls into play Section 118 as well.

CONCLUSION

The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
Special Assistants to the Attorney General.

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

314 (12)

NOV 6 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

Nos. 200, 201

PIERRE S. DU PONT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOHN J. RASKOB,
Petitioner,

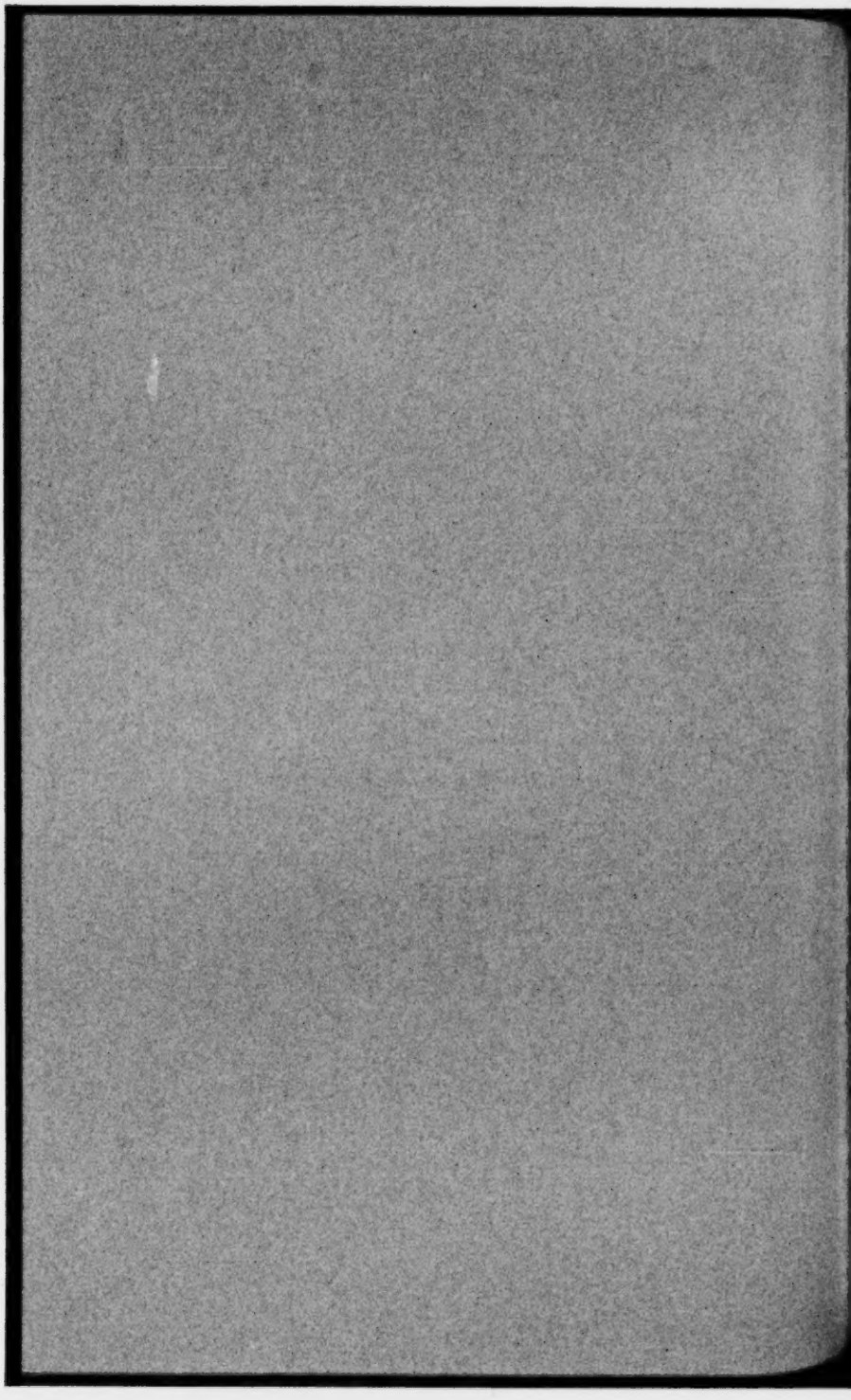
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR RECONSIDERATION OF THE PETITION FOR WRITS OF CERTIORARI

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

Post Printing Company, Inc., 86 Lafayette Street, New York, N. Y.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 200, 201

PIERRE S. DU PONT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JOHN J. RASKOB,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR RECONSIDERATION OF THE PETITION FOR WRITS OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners pray for reconsideration of the Petition for Writs of Certiorari herein, denied October 13, 1941, and respectfully show:

(1) In the Petition for Writs of Certiorari, one of the reasons given for granting the writ (reason No. 5) was that

the *Raskob* case involves the question, created by this Court's decision in *Higgins* v. *Smith,* 308 U. S. 473, of the proper cost basis to a purchaser of property acquired on a sale not considered to result in a deductible loss to the seller. We respectfully reiterate that, since this is a question of general importance, in the interest of satisfactory administration of the tax law, the uncertainty, created by this Court's decision in *Higgins* v. *Smith,* should be dispelled.

It would seem significant that, in opposing the Petition for Writs of Certiorari, the Departmet of Justice opposed only on the main question of the deductibility of the losses on the sales, and interposed no objection to the granting of the writ on this further question.

(2) As pointed out in the Petition for Writs of Certiorari (p. 16), the decision of the Circuit Court is inconsistent, if not directly in conflict, with the decision of this Court in *Helvering* v. *Johnson,* 308 U. S. 523. In the recent case of *Deputy* v. *Du Pont,* 308 U. S. 488, 490, the Supreme Court granted certiorari, on the application of the Government, "because of the asserted inconsistency of" the Circuit Court ruling in favor of the taxpayer with prior decisions of the Supreme Court. The taxpayer in the *Deputy* case is one of the petitioners here. We respectfully submit that the reason given for granting certiorari in the *Deputy* case is present here. If such reason is considered adequate on the petition of the Government there would seem to be no good reason why it should not be considered adequate upon the petition of the taxpayer.

This case involves tax liability for the year 1929. The question which was the subject of the *Deputy* case was involved in this case.[1] It would seem only fair that the

---

[1] 7 R. 127-143.

Supreme Court, having granted certiorari on the petition of the Government and decided one of the questions determining the taxpayer's 1929 Federal income tax liability, it now should grant certiorari on the petition of the taxpayer and decide the remaining question as to that year, when the reason for granting certiorari on the earlier issue is also present with respect to the remaining issue.

There is far greater reason for granting certiorari here than there was in the *Deputy* case. There the District Court,[2] and this Court,[3] considered that the facts "were 'beyond the norm of general and accepted business practice' and were in fact 'so extraordinary as to occur in the lives of ordinary business men not at all' and in the life of the taxpayer 'but once.' "[4] In his dissenting opinion Justice Roberts found that the majority reached "a conclusion based solely upon the peculiar facts of this single case."[5]

On the other hand, it is safe to say there is no single tax question which has arisen more often and which has caused more confusion than the question involved here, namely, the degree of severance from property necessary to result in a deductible loss. The Circuit Court found that the decisions on this question are in "chaos" (6 R. 254). So far as known, the Supreme Court has never considered the question except in the cases of *Higgins* v. *Smith, supra,* and *Helvering* v. *Johnson, supra.* In those two cases different conclusions were reached. There is thus far greater reason from the standpoint of general

---

[2] 22 F. Supp. 589, 597.

[3] 308 U. S. 488, 495.

[4] Respectful exception is taken to this statement. It is believed it was an erroneous characterization of the situation involved there.

[5] 308 U. S. 488, 501.

importance of the question for granting certiorari here than there was in granting certiorari in the *Deputy* case.

Under the circumstances, it is submitted even-handed justice dictates that the Supreme Court should reconsider the Petition.

(3) Shortly after the Circuit Court decision was rendered, the Honorable Judge Joseph Buffington, one of the three Circuit Judges who heard the case, gave testimony in court[6] which establishes that at the time of the argument of this case he was eighty-four years of age,[7] that for a number of years he had enjoyed very little sight or hearing,[8] that in December 1939, three months before the argument in this case,[9] he had an operation for cataract as a result of which he was unable to read or write for three months,[1] that this operation gave him a dreadful shock,[2] that he used no one to help him in reading briefs and records,[3] that he employed no hearing device in court,[4] and that he sometimes left the bench after argument without the information he should have had.[5]

---

[6] In the proceeding *United States* v. *J. Warren Davis and Morgan S. Kaufman* (U. S. D. C., E. D. Pa.), Docket No. 8969, March Sessions 1941, Hearing dates May 23, 1941 and August 6, 1941. The complete testimony of Judge Buffington is set forth in the Appendix.

[7] Appendix, p. 8.

[8] Appendix, pp. 13-17, 19, 20, 24, 34-40, 45, 52, 65, 66.

[9] 6 R. 250, 251.

[1] Appendix, pp. 15, 65, 68.

[2] Appendix, pp. 64, 65.

[3] Appendix, pp. 17, 18.

[4] Appendix, p. 37.

[5] Appendix, p. 46.

It was quite apparent at the argument of this case that Judge Buffington could hear very little of what was being said by counsel. The record in this case consisted of seven volumes. The Circuit Court briefs covered over four hundred pages. In view of his testimony in the *Davis* case, the inference seems almost inescapable that Judge Buffington was able to read very little of the material which proper consideration of this case would require.

By reason of this situation, it is quite possible the interests of Petitioners have been gravely prejudiced. It is reasonable to speculate that a different result might have been reached if Judge Buffington's faculties of sight and hearing had been more normal, or if a Judge fully possessed of his faculties had sat in his place.[6] It is, of course, no answer that the decision of the Circuit Court was unanimous. Presumably, this Court will readily concede the sole function of an appellate judge is not merely to cast a vote. If one of the Circuit Judges had died at the conclusion of the oral argument clearly a reargument would have been required even though the remaining two judges were then in agreement. Indeed, if Judge Buffington had given his testimony in the *Davis* case after the oral argument here and before the Circuit Court decision, it is to be assumed a motion for reargument would have been granted.

Petitioners may or may not have a remedy as a matter of law because of this situation. If this Petition for Reconsideration should be denied it will be necessary to determine that question. It seems possible, although the statement is made without prejudice, that the equities are not such as are afforded a legal remedy. Accordingly, the facts are being brought to this Court's attention now. Certiorari being a matter of discretion, it is in the power of this Court by granting the Petition for Writs of Certiorari and

---

[6] *Cf.* dissenting opinion in the Board of Tax Appeals (6 R. 100).

reviewing the case to remove the possibility of a miscarriage of justice which is inherent in this peculiar situation.

It is unnecessary to contend that this in itself is a sufficient reason for granting the Petition. It is additional to the other reasons presented.

WHEREFORE, it is earnestly prayed that the Court reconsider the Petition for Writs of Certiorari and grant the same.

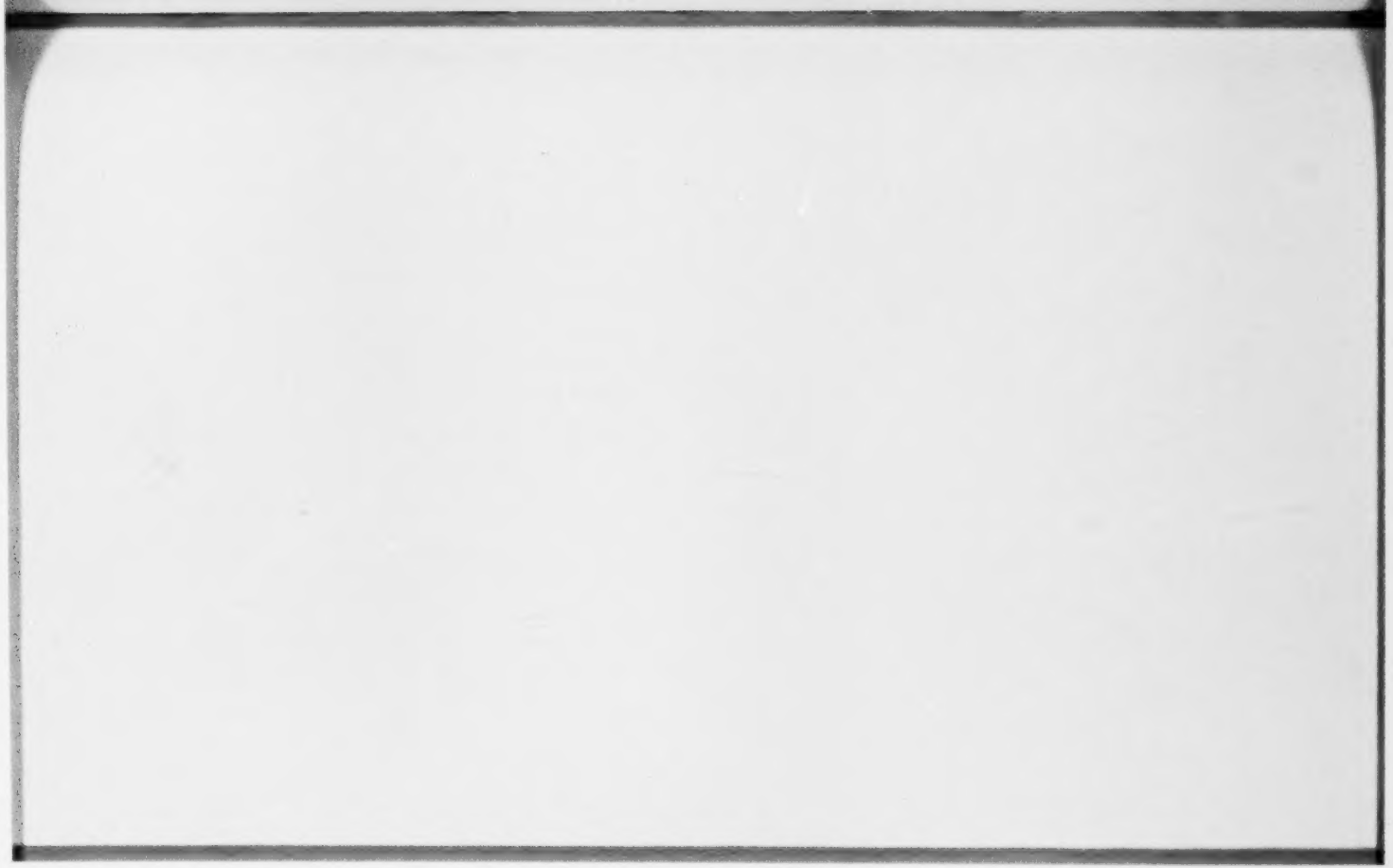
Respectfully submitted,

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

We certify that this Petition is presented in good faith and not for delay.

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

November 1941.



APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, v. J. WARREN DAVIS and MORGAN S. KAUFMAN.	No. 8969 March Sessions, 1941.

Before HON. ROBERT N. POLLARD, J., and a Jury.

May 23, 1941

AFTER RECESS

Present: Counsel as before noted.

Mr. Gahagan: The Government calls the Honorable Judge Joseph Buffington.

JOSEPH BUFFINGTON, having been duly sworn, was examined and testified as follows:

By Mr. Gahagan:

Q. Judge Buffington, did you hold a position as senior circuit judge of the Third Circuit Court of Appeals for many——

Mr. Gray: We can't hear you.

Q. Judge Buffington, you were senior circuit judge—can you hear me now, sir?

A. Yes.

Q. (Continuing) Of the Circuit Court of Appeals for the Third Circuit for many years, were you not, sir?

A. I was.

Q. And you sat upon the same court on which Judge Davis sat?

A. I did.

Q. Would you give the jury some idea of your background? I will ask a few questions to bring it out. When were you born, sir?

A. September 5, 1855.

Q. How old are you at the present time?

Mr. Gray: We will, of course, admit anything that the district attorney wants with reference to Judge Buffington. We have known him for years as senior circuit judge, a very able man. We will admit anything that you want to have admitted on the record with respect to him.

The Court: Let him proceed in his own way.

By Mr. Gahagan:

Q. How old are you at the present time, sir?

A. I am in my eighty-sixth year.

Q. Did you ever go to law school, Judge Buffington?

A. No.

Q. Where did you get your legal education, sir?

A. I was registered with a practicing lawyer. I was placed by my father, who was a lawyer, in a vacant room in our house and given a copy of Blackstone and told to make a lawyer of myself.

Q. Did there come a time, Judge Buffington, when you were appointed to the Federal bench, sir?

A. There did.

Q. And when was that, sir?

A. That was in 1892.

Q. By whom were you appointed, sir?

A. By Benjamin Harrison.

Q. President Benjamin Harrison, sir?

A. President Benjamin Harrison.

Q. And by the way, Judge Buffington, aren't you the oldest Federal Judge alive at this time?

A. Well, I guess I am.

Q. How long have you been on the Federal bench, sir?

A. From 1892. That makes forty-nine years.

Q. When you were appointed to the Federal bench, was that the United States District Court, sir?

A. Yes, sir.

Q. And for what district, sir?

A. Western District of Pennsylvania.

Q. And did there come a time, sir, when you were appointed to the Third Circuit Court of Appeals?

A. There did.

Q. And when was that, sir?

A. That was in 1906.

Q. And by whom, sir?

A. Theodore Roosevelt, President Theodore Roosevelt.

Q. And you served as senior circuit judge for the Circuit Court of Appeals for the Third Circuit from 1914 until 1938, sir?

A. I believe that is correct.

Q. And have you retired now, sir?

A. Yes, I retired——

Q. May I refresh your recollection? June 1, 1938?

A. That is right, June 1, 1938.

Q. And as a retired judge have you been called back after June 1, 1938, to sit on certain cases, sir?

A. Well, occasionally.

Q. And after you retired on June 1, 1938, did Judge Davis become senior judge of the Circuit Court of Appeals, sir?

A. He did.

Q. And usually did there sit three judges on the Circuit Court of Appeals, sir?

A. That is right; in those days, three.

Q. And you were the presiding judge, were you not, sir?

A. Up until I resigned.

Q. Was there a time after June 1, 1938, when Judge Davis called you back to sit in certain cases with him, sir?

A. Yes.

Q. And in view of the retirement act you continued to draw your former salary of $12,500 a year as circuit judge, did you not, sir?

A. I did.

Q. In all, how long have you known Judge Davis?

A. I have known Judge Davis from the time he was United States District Attorney in New Jersey.

Q. And was Judge Davis appointed to the Circuit Court of Appeals about 1920, sir?

A. Well, I don't remember the date, but I should judge it was about that time.

Q. And you were a judge of that court at that time, sir?

A. I was.

Q. And you have sat with Judge Davis as a judge from 1920 to 1938; is that right?

A. That is right.

Q. In addition to your association with Judge Davis in the Circuit Court of Appeals can you state whether or not you have been a close personal friend of his?

A. I was and am.

Q. In addition to your association with Judge Davis as an associate judge, did you have any association with him in a social way?

A. Yes, I visited at his home.

Q. Did he visit your home?

A. I had no home; I live in a hotel.

Q. In addition to visiting Judge Davis at his home, did you visit certain places in Florida at the same time Judge Davis visited there?

A. I visited one place. That was the Battle Creek Sanitarium.

Q. And you likewise knew the defendant Morgan S. Kaufman, sir?

A. Yes.

Q. About how long have you known him, sir?

A. I have known Morgan Kaufman from, oh, fifteen, twenty years.

Q. And in addition to knowing Morgan Kaufman, you also know his brother David, do you not, sir?

A. I do. I have known him for that time.

Q. Can you state whether or not you have been close friends to Morgan and David Kaufman, sir?

A. I have been and am.

Q. And, to your knowledge, can you state whether or not Judge Davis is a close friend of Morgan Kaufman?

A. I think he was, yes.

Q. Have you visited Morgan Kaufman at his home in Towanda?

A. Yes.

Q. And as between Morgan and David Kaufman, which was the brother that you visited?

A. David had an apartment in the same hotel that I did. I visited him frequently.

Q. And from time to time would you see Judge Davis in the period of 1936 and 1937, at the home of Morgan Kaufman at Towanda, Pennsylvania?

A. Occasionally I did.

Q. Does David have an apartment? Where is David's apartment, sir?

A. At this same hotel, sir?

Q. Where is that, sir?

A. Bellevue Stratford.

Q. And from time to time have you seen Judge Davis in the apartment, sir?

A. I have seen him there at times.

Q. And in 1936 and 1937, sir?

A. I think so.

Q. Have you likewise seen Morgan Kaufman there?

A. Yes.

Q. And have you seen Morgan Kaufman at the same time that Judge Davis has been there?

A. Well, I think there were occasions that Judge Davis came there that Morgan was there.

Q. Did Morgan Kaufman also visit the same Battle Creek Sanitarium in Florida at or about the same times you and Judge Davis were there?

A. Yes.

Q. And I draw your attention to the years 1935, 1936, and 1937 and ask you if you visited there about the same time as Morgan Kaufman and Davis?

A. I did.

Q. And they were there about the same time with you; is that right, sir?

A. Yes.

Q. Now, when you went to Florida did you take some of your work along with you, sir?

A. I did take a great many cases down there and worked while I was there.

Q. And did you from time to time consult with Judge Davis with respect to the cases in Florida?

A. I did in the cases that he was concerned with.

Q. Now, Morgan Kaufman is a lawyer, is he not, sir?

A. Yes.

Q. And he was a lawyer who was practicing throughout 1935 and 1937 and 1938 regularly before the Third Circuit Court of Appeals; isn't that right, sir?

A. He was there occasionally. I know that he was.

Q. And he had cases in which he would argue before your court during that period, 1935, 1936, and 1937; is that right, sir?

A. Oh, I remember one or two cases, yes.

Q. I notice, Judge Buffington, that you have a device on your ear that helps you to hear; is that right, sir?

A. That is right.

Q. When was the first time that you procured such a device, sir?

A. I should say about a year or a year and a half ago.

Q. Going back to, say, 1939, sir?

A. Yes.

Q. And before 1939 you didn't have it, sir?

A. Oh, no. I tried numerous ones both here and abroad, but I never got anything that helped me till I got this one.

Q. When you were sitting on the bench did you use any listening device in 1935, 1936, 1937 and 1938?

Mr. Gray: I am sorry; I must object to that. I wanted to let it go as far as I possibly could, but I don't see any reason why he should question the Judge about his hearing device.

The Court: The objection is overruled.

Mr. Gray: Exception.

By Mr. Gahagan:

Q. In the year 1936, when you were sitting on the Third Circuit Court of Appeals, did you have any listening device?

A. No, I did not.

Q. And in the year 1937 did you have any listening device?

A. No.

Q. What was the condition of your hearing in the year 1936, sir?

A. Totally deaf in this ear (indicating).
Q. And you are pointing now to your left ear, sir?
A. I am pointing to my left ear.

Mr. Gahagan: And may the record indicate that I am within about three feet of Judge Buffington at the present time, three or four feet of Judge Buffington at the present time, and I am asking these questions in a rather loud tone.

Q. Can you hear better now with your listening device than you could then, sir?
A. Somewhat better.
Q. What was the condition of the hearing in your right ear, sir?
A. I would say considerably better. I think this has helped me a great deal.
Q. And your hearing is better now than it was in 1936; is that right, sir?
A. That is, with the aid of this device.
Q. Yes. And what was the condition of your hearing in your right ear? You say your left ear was stone deaf, sir. What was the condition of your hearing in your right ear?
A. Well, my right ear was—I could hear somewhat with it, but I was very much embarrassed by my lack of hearing.
Q. Could you hear the arguments that were made before you in court, sir?
A. Well, I would have great difficulty. I couldn't hear at all even with this device what Mr. Gray was saying.
Q. What was the condition, Judge Buffington, of your eyesight in 1935 and from 1935, on, sir?
A. I had been anxious about my eyes, and in December, 1934, I went to Dr. Weber, a very eminent practitioner here in Philadelphia, and from that time on up to the present time I have been going to him constantly. He is setting the time every time. I wouldn't go to him when-

ever I wanted to unless there was something special, but he would notify me and he has kept trace of my hearing ever since.

Q. Your eyesight, you mean, sir?

A. My eyesight.

Q. Now, go back to my question, which was, What was the condition of your eyesight in the beginning of 1935, sir?

A. Well, sir, the condition of my eyesight was such that I could not read the newspapers for two or three years—that is, newspaper print. I would get the headlines, but if I wanted to see anything, I would have to use the magnifying glasses and stick very close to it. I was during those years very apprehensive of an operation for cataracts on my right eye. It grew worse, and finally in December, 1939, I had an operation for cataract which put me on my back and I was unable to read or to keep in the light part of the time for three months.

Q. And, sir, is your eyesight now better than it was in 1936, and '7, and '8?

A. Through the operation of the cataracts?

Q. Yes, sir.

A. It is. During that time my left eye——

Q. Meaning in 1936, '7, and '8, sir?

A. Yes, sir. During that time my left eye was deteriorating, and with the prospect of another operation for my left ear for cataract.

Q. Your left eye?

A. Left eye, yes.

Q. Could you read with both eyes, sir?

A. No—oh, I could hold down here and with the aid of magnifying glasses I could, by getting very near to the text——

Mr. Gahagan: May the record indicate that Judge Buffington moved within about four inches or three inches of the Bible sitting before him?

The Witness: Yes, that's right.

By Mr. Gahagan:

Q. And, sir, how do you read the briefs and records that were sent in before you in the Court, sir?

A. Well, sir, I used a couple of powerful magnifying glasses during that time, and there were oftentimes in Court when my brother Judge, whoever was sitting near me, would turn down a page for me where there was something that really I couldn't read myself, and they turned down that page for me so that I could look it up afterwards.

Q. Was that because you couldn't hear when the counsel mentioned the page in Court?

A. Well, I don't know just what the cause of it was, but that was the situation.

Q. Now, you said you used a magnifying glass to read whatever papers and records you read, sir. Were you able to look through both eyes, through that magnifying glass and read?

A. No.

Q. Only through one, is that right?

A. Only through my right eye.

Q. At the present time can you read with your left eye?

A. Oh, no. I can— (indicating).

Q. Can you see at all, sir?

A. No, I can't with my left eye, alone.

Q. These particular glasses you have on now, did you have those glasses in 1936, '7 and '8?

A. No, I only got those glasses after my operation. They were specially made in Rochester, New York, at one time.

Q. And, sir, those particular glasses, you can see better now with those glasses than you could in 1935, '6, '7, and '8?

A. Yes, very much better.

Q. And you can read better now than you could during that time?

A. I can.

Q. Is it correct to say, sir, from what you have said that you would have to hold the magnifying glass to within about two inches of the page and your eyes within about two inches or three inches or four inches of the page when you were reading the records and briefs, sir?

A. I think that fairly states it.

Q. And you only read through one eye, sir?

A. Yes.

Q. Now, sir, during this period in 1935, 1936, 1937 and 1938, sir, did you have any law clerk or anyone to look up law for you, sir?

A. No.

Q. Did you ever have a law clerk, sir?

A. I had a secretary when I was first admitted, when the judgeship first took place; I had a secretary who worked for me, and he was a stenographer, and he was admitted to the Bar, and I kept him for a number of years.

Q. That is beginning in 1892?

A. Yes, beginning in 1892. I found from the observation of other people that when you had a law clerk, you used him for about two years, and then if he was worth anything, you had to get another one.

Q. I see, sir. The question I am asking, sir, is whether or not—I think you stated that you had no law clerk at all during 1935, 1936, 1937, 1938 and 1939, sir.

A. That's right.

Q. And you have none at the present time?

A. No.

Q. Is it correct to say that all the reading of any of the briefs and of those matters that came before you had to be done by yourself with your own eyes?

A. Yes, pretty much it had to be done in that way.

Q. Did you have any practice of having people read things to you, sir?

A. No; oh, I would often get my stenographer to do something after a case was argued. I got help from her. She is very intelligent and well trained.

Q. Yes, you got help from her, but was it her practice to sit down and read the records over to you?

A. No.

Q. Or read the briefs over to you?

A. No.

Q. Now, sir, was the general practice of the Third Circuit Court of Appeals during the years 1935, to 1938, inclusive, to have the Judges prepare conference notes in discussing the decisions, sir?

A. Yes, sir. I had three colleagues who were most admirable in that respect, Judge Thompson, Judge Davis and Judge Woolley. They all came in with full notes.

Q. And your notes, were they long or brief, sir?

A. My notes were very scanty.

Q. And were those conference notes sometimes in the form of opinions, sir?

A. They would be, sometimes a man would come in with conference notes that could be turned into an opinion very promptly. I have often felt that I did an injustice to my colleagues, all of whom were very good workers and well posted in case law, that I simply used their notes as the meat of an opinion which I could very readily prepare from those notes.

Q. Can you state during the period of 1935 to 1938 whether or not you used Judge Davis's conference notes in parts of opinions you have written, sir?

A. I have occasionally of all of the Judges, notes of all of the Judges.

Q. And was there a practice in the Circuit Court of Appeals to have the junior Judge read the opinions, sir, at the conference?

A. Read the notes?

Q. The notes, yes, sir. Pardon me. I meant notes.

A. Yes.

Q. I draw your attention, sir, to certain cases that were before you in 1936, '7 and '8, arising out of the Fox bankruptcy. Do you recall the Fox bankruptcy coming in?

A. I do.

Q. Do you recall how many cases came before you involving that matter, sir?

A. I think about five.

Q. Five cases, sir, and at my request have you examined the opinions in the five cases?

A. I have.

Q. And at my request have you had your secretary, Miss Pierce, read the opinions to you, too, sir?

A. I have read them aloud, and she has read some, but my hearing is such, my eyesight is such now that I can read—

Q. And you couldn't read them yourself in 1936?

A. No.

Q. Or 1937, or 1938; is that right, sir?

A. Yes,——

Mr. Gray: Now, wait——

The Witness: —with the help of magnifying glasses.

Mr. Gray: If your Honor pleases, because of the respect I have for Judge Buffington, I have allowed Mr. Gahagan to go on and testify and testify but there are certain points we have to stop him. Judge Buffington has said he could only read with the magnifying glasses at that time, and now Mr. Gahagan is putting in the Judge's mouth, sir, he couldn't read them at all. I am objecting to it.

The Court: State the evidence correctly, Mr. Gahagan, and accurately.

Mr. Gahagan: I apologize, your Honor.

By Mr. Gahagan:

Q. Could you have read the opinions that you have read recently, the five opinions, without the aid of your magnifying glass, sir, in 1936?

A. I would have had to have my magnifying glasses.

Q. Would it be difficult or easy for you to read those opinions at that time——

Mr. Gray: I object to that. I haven't objected to Judge Buffington's testimony, but I do have a decided objection to Mr. Gahagan going on as he would like to have the Judge.

Mr. Gahagan: I object to that and ask to have it stricken from the record.

The Court: Just proceed in an orderly way and ask him questions, Mr. Gahagan.

Mr. Gahagan: Thank you, sir.

The Court: Do you have an objection?

Mr. Gray: I have, sir, but I presume he is withdrawing it, because he is starting another.

The Court: Ask a question of the Judge.

Mr. Gahagan: I will withdraw my previous question that is unanswered.

The Court: All right.

By Mr. Gahagan:

Q. Have you, Judge Buffington, read the case of All Continent Corporation v. Steelman, C. C. A. Docket No. 6253, reported at 86 Federal 2nd——

A. Just give me the docket number again.

Q. No. 6253, sir, in the Circuit Court of Appeals. I show you, to refresh your recollection, a copy of the report, sir.

A. Now, give me that number again.

Q. No. 6253. What cases have you read at my request, sir? Maybe that would be much easier.

A. Well, I have studied and read Fox against the Capital Company, Docket No. 6472.

Q. Yes, sir.

A. I have read Leitstein against the Capital Company, 6473.

Q. Yes, sir.

A. I have read Docket No. 6260.

Q. What is the name of that case?

A. All Continent against Steelman.

Q. Yes, sir.

A. I have read 6253.

Q. What is the name of that case, sir?

A. All Continent against Steelman.

Q. Yes, sir. Now, after having read those cases——

A. Now, wait a minute.

Q. Pardon me, sir.

A. And I have read 6605, Hirsh against the Capital Company.

Q. Hirsh, Newman, Reass and Becker?

A. Sir?

Q. Hirsh, you say?

A. Yes.

Q. I see. You have that down. Now, sir, did you write any of these five opinions?

A. I did not.

Q. Do you recall now what Judge was asked to report on those cases, sir?

A. Judge Davis.

Q. Was the Court unanimous in all of those opinions, sir?

Mr. Gray: Just a minute, please, Judge Buffington. That is objected to, if your Honor pleases. We have records about these things.

Mr. Gahagan: I think the Judge has just read the records.

Mr. Gray: I object to it.

The Court: The objection is overruled.

Mr. Gray: Exception.

By Mr. Gahagan:

Q. Can you state whether or not the decision was unanimous in all of these opinions, sir?

A. Oh, no, it was not. There were some dissents by Judge Thompson.

Q. And when a Judge enters a dissent, he writes a dissenting opinion by himself, does he not, sir?

A. Yes.

Q. And there were only three of you sitting on the Bench at that time and in those cases, is that right, sir?

A. In the Steelman?

Q. Yes, all those cases, sir.

A. Yes, there were three Judges of us.

Q. Who were the three Judges, sir?

A. Judge Thompson, Judge Davis and myself.

Q. And certain of those cases—and would you name the cases in which Judge Thompson dissented, sir?

Mr. Gray: In view of your Honor's ruling, as I recall the ruling you made in the early part of this trial, it makes no difference whether these decisions were right, wrong, unanimous, dissented from, or anything of the kind. For that reason I make an objection to this line of examination.

The Court: All right. I will tell the jury for what purpose the evidence is received.

Mr. Gahagan: My last question, sir—will you read the question, please?

(The question was repeated by the reporter as follows:

"Q. And certain of those cases—and would you name the cases in which Judge Thompson dissented, sir?")

A. Well, there was All Continent against Steelman, Docket No. 6260. It is difficult for me to locate the two, but there were two cases. It is a matter of record, I imagine.

By Mr. Gahagan:

Q. All right, sir. Now, sir, was there any one Judge who assumed the burden of work of the Circuit Court of Appeals, in the year 1936, sir?

A. I think I may safely say that Judge Davis was most willing and most efficient, and shouldered more of the work. He never complained of piling work on him.

Q. And do you know of your own knowledge who wrote these particular opinions that you have referred to, the five opinions?

A. I did not see the physical writing of them, and I can't state who did write them. I want here to say, Mr. District Attorney——

Q. Go right ahead, your Honor.

A. In saying I did not write these opinions, I don't want anyone to have the impression I did not agree and approve of those opinions. I did, and with all respect to the Supreme Court where they reversed us in one case, I still adhere to that, and have accepted the responsibility of it.

Q. Yes, sir, but, in any event, you did not write them, sir?

A. I did not write them——

Mr. Gray: Now, wait. I object to that.

Mr. Gahagan says he didn't write them, and I object to Mr. Gahagan saying he did not write them.

The Court: I order the last question and answer stricken out.

By Mr. Gahagan:

Q. Now, Judge Buffington, with respect to the handling of the calendar and the handling of oral arguments in

Court, you stated you couldn't hear the oral arguments very well, is that right, sir?

A. I could not.

Q. How did you know what was going on in Court, sir?

Mr. Gray: That is objected to, sir.

Pardon me a minute, if you please, Judge. I am objecting to his cross-examination of Judge Buffington. I have no objection to his asking questions and getting the Judge's views instead of getting his own.

The Court: What was the question?

(The question was repeated by the reporter as follows:

"Q. How did you know what was going on in Court, sir?")

The Court: He has already answered that.

By Mr. Gahagan:

Q. And, sir, is it correct to say that throughout the period 1936, 1937, and 1938, that Judge Davis was your ear in court?

A. Well, that is a homely way of expressing it, but it was about the fact. I trusted Judge Davis as to the cases that had been assigned to him, and I trusted him implicitly.

Q. Did you rely on anyone esle but Judge Davis, sir?

A. Oh, well, I cannot say that, but I did rely a great deal on him.

Q. In oral application, sir, before the court, can you state—are you able to state—whose decision it was of the three judges that controlled, sir?

Mr. Gray: That is objected to, if your Honor please. I think it is drawing a fine point to determine whose decision four or five years ago in an oral application—

The Court: Objection sustained.

By Mr. Gahagan:

Q. Who announced the decisions of the court from the bench with respect to oral applications, sir?

A. Well, the presiding judge would do that.

Q. And did you do that, sir?

A. I did on occasions, yes, I guess.

Q. And while you were presiding judge, did you do that, sir?

A. Yes.

Q. And when an oral application was made to your court, sir, on what basis did you decide what was to be done, sir?

Mr. Gray: Just a moment, please, Judge Buffington.

In the first place, no judge, no matter how able he is, could tell Mr. Gahagan now on what they decided when the question is a general one. If he puts that question as to some particular case it might have some relevancy, but it certainly has not when he asks him the general proposition on what basis he decided an oral application.

Mr. Gahagan: I will withdraw the question for the sake of saving time and ask you if all applications for the Fox cases—in the Fox cases—whose decision controlled in the oral applications before the Court, sir.

Mr. Gray: Objected to, if your Honor please, as being too general, and I do not know what he means by "whose decision controlled," but my first objection, I think, is well taken.

The Court: The witness can answer the question. Objection overruled.

Mr. Gray: Exception.

The Witness: Now what is it?

Mr. Gray: May I ask that the question be read, because if he puts another, he puts me in the position of having to make another objection.

The Court: Read the question.

(The reporter began reading as follows: "I will withdraw the question for the sake of saving time and ask you if in all applications for the Fox cases—in the Fox cases—"

Mr. Gahagan: Cross that out. I cannot understand it the way it is down there.

The Court: Wait a minute; you haven't heard it all yet.

Mr. Gahagan: May I withdraw the question? I would like to phrase it another way if I may.

The Court: Question withdrawn.

By Mr. Gahagan:

Q. I direct your attention, Judge Buffington, to five cases, the names and numbers of which you have given us, and ask you on oral applications before the Third Circuit Court of Appeals whose decisions—decision—controlled.

Mr. Gray: If your Honor please, not only do I make the objection that it is totally immaterial and irrelevant, but I make the objection, if your Honor pleases, that these cases that have been referred to are none of them cases concerning Mr. Fox.

The Court: Is that all?

Mr. Gray: That is all.

The Court: Objection overruled; exception.

Read the question.

Mr. Gratz: Will your Honor entertain the objection that there has been no evidence of oral applications?

The Court: Objection overruled.

Mr. Gratz: Exception.

(The reporter read the question as follows: "I direct your attention, Judge Buffington, to the five cases the

names and numbers of which you have given us, and ask you on oral applications before the Third Circuit Court of Appeals whose decisions—decision—controlled.")

The Witness: Well, I don't understand the question exactly—whose decision in what respect? You mean—

Mr. Gahagan: I will take it another way—may I, your Honor, explain it?

The Court: Yes.

By Mr. Gahagan:

Q. In that particular matter do you recall whether or not there were certain oral applications made to the Court, sir?

A. Yes.

Q. And in those oral applications that were made to the court in those five cases, whose decision controlled? Was it your decision, sir?

A. No, not—I don't think it was, because those cases had been assigned to Judge Davis and we naturally would look to him for guidance about those matters.

Q. Now, Judge, one of the cases that I have referred to, or you have referred to, is the case of Eva Fox—the Capital Company—do you recall that case—a contempt proceeding?

A. Yes.

Q. Did there come a time, sir, when a doctor was appointed in the Third Circuit Court of Appeals to examine Eva Fox, sir?

A. Yes, sir.

Mr. Gray: Objected to, if your Honor pleases. These matters are matters of record.

The Court: What have you got to say to that?

Mr. Gahagan: This is purely preliminary. My next question is going to be, your Honor, Who suggested

that the doctor be appointed in the Third Circuit Court of Appeals?

The Court: Objection overruled.

Mr. Gray: Your Honor grants us an exception?

(Question repeated by the reporter as follows: "Did there come a time, sir, when a doctor was appointed in the Third Circuit Court of Appeals to examine Eva Fox, sir?")

The Witness: There did.

By Mr. Gahagan:

Q. At whose suggestion was the doctor appointed, sir?

Mr. Gray: That is objected to as totally immaterial.

The Court: Objection overruled; he may answer.

By Mr. Gahagan:

Q. At whose suggestion was the doctor appointed, sir?

A. Judge Davis had been in the Jefferson Hospital in Philadelphia on two occasions, one for a serious operation, and of course knew the dean, and naturally he suggested the dean as a proper person to examine Mrs. Fox. I knew the man by reputation, and I think—and I am sure—Judge Thompson did; and the suggestion was made, and I think both Judge Thompson and myself acquiesced in it. And he was appointed.

Q. Yes, sir; and the suggestion of having a doctor appointed—who suggested that, if anybody?

A. Well, I don't remember distinctly, but I think it would naturally come from Judge Davis; he was familiar with the man and I was not.

Q. Now, sir, did you at any time during the time you were on the Circuit Court of Appeals attend to any matters with respect to the calendar and the advancement of cases, sir?

A. No, I left that—when I was presiding judge, I left everything of that kind to the clerk.

Q. You yourself had nothing at all to do with that; is that right, sir?

A. Oh, no, I simply instructed the clerk, we want business and we don't want to be bothered with applications about setting cases for particular days, and I left that always to the clerk.

Mr. Gahagan: Just one second—may I confer?

By Mr. Gahagan:

Q. In cases, sir,—and I refer now again to the five cases arising out of the Fox bankruptcy that you mentioned—would you sign orders even though that case was referred to Judge Davis to report, as you stated?

A. Would I?

Q. Yes, sir.

A. I don't remember of doing any.

Mr. Gahagan: I see, sir. No more questions, Judge Buffington.

Cross-examination by Mr. Gray:

Q. I have practiced before you, too, Judge Buffington, haven't I?

A. In what cases?

Q. Well, I cannot give you the details of the cases.

A. Well, I can't either, but I assume, of course,——

The Court: Order.

Mr. Gray: The purpose of my asking him that was this: the question has been put to you and you have answered "yes" that Mr. Kaufman as an attorney has had cases in the Third Circuit Court of Appeals. That is true, isn't it?

The Witness: That is true.

By Mr. Gray:

Q. Many other lawyers have, too, haven't they?

A. Certainly, certainly.

Q. And those that are admitted to practice in the courts have a perfect right, of course, to come there and plead their cases.

A. I do not mean now to infer anything else.

Q. Of course, you don't. I did not think so, sir.

A. No.

Q. And all the proceedings in these five cases that have been talked about were perfectly regular, weren't they?

A. I believe so.

Q. You believe so now, do you not?

A. Well, I believed it was then, but I want you to understand distinctly——

Q. Yes, sir.

A. —that in saying I did not write these opinions I am not shirking or repudiating those opinions—I still stick to them as good law, bowing, of course, to the Supreme Court in the one case that was reversed.

Q. And they were given very careful consideration by you?

A. Yes.

Mr. Gray: I think that is all. Thank you.

The Witness: I think, if——

By Mr. Gray:

Q. Anything else you want to say, Judge, go ahead.
A. No, no,—I want to say this, Mr. Gray——
Q. Gray——
A. I want to say this—it is probably out of the record, but my last—my time through these cases, during my stay down in Florida, I exposed myself too much to sun exposure. I feel that—I know—I fear that it was—that some of my—oh, what do you call them—nerves were burnt. I would sit during these later seasons in the Circuit Court of Appeals ofttimes when my back was a mass of blisters from an old-fashioned thing called "shingles" and even my colleagues didn't even know I was suffering from them.
Q. Thank you, Judge. In order that we might not have just different counsel asking, Mr. Kaufman was not counsel in any of these five cases, was he, Judge?
A. Oh, no, no, no.

The Court: Is that all?

By Mr. Gahagan:

Q. I just want to clear up one thing. I don't know if you understood Mr. Gray, sir. Did you have anything to do with the writing of the opinions in the five Fox cases, sir?
A. Not at all.
Q. And they were entirely Judge Davis'?
A. That's right.

Mr. Gray: Now wait a minute.

By Mr. Gray:

Q. I take it that the suggestion in Mr. Gahagan's question is that you didn't know anything about these opinions.

You did know all about them? You gave them consideration, and whether you wrote them or did not write them, you joined in them, didn't you?

A. Yes, and I regarded them as good law.

Q. You still do?

A. I still do, bowing to the Supreme Court.

Q. In the case in which they were reversed. That is all.

The Witness: If your Honor please, I want to make one remark.

The Court: Yes, sir, you may.

The Witness: And that is this: The question naturally arises why, if I put my name to those opinions, how it came that I approved of opinions that were written by Judge Davis. I have kept silent right through all this time, but I feel it is due myself and Judge Thompson and Judge Davis to make this statement: Prior to all these Fox cases there had been a number of cases that were appealed from Judge Avis.

Mr. Gray: Judge Avis in Camden.

The Witness: In which there were reversals, and Judge Davis was called upon to write those opinions. In some of them there was a very hot feeling, a great deal of ill will and feeling, and I know that in some of them the Circuit Court of Appeals, speaking through Judge Davis, spoke pretty firmly. I knew that Judge Davis, if these opinions were filed as coming from him, it would increase the aloofness and feeling between Judge Avis and himself that ought not to exist in a court of appeals. On the contrary, Judge Avis I felt would not object to a reversing opinion by me, as I had very seldom had occasion to reverse him, and our relations were most cordial. I therefore took upon myself, for the peace and good will of the circuit, to shoulder the responsibility of those opinions and put

them out in my own name, although Judge Davis had written them.

I thank you for the permission.

Mr. Gahagan: Just one other question, sir.

The Court: I thought you were through.

Mr. Gahagan: Yes, I was, sir, but there is something else.

This question I would like to make optional with Judge Buffington, whether he wants to answer it or not, sir. It is something that he has told me.

Mr. Gray: Wait. I am perfectly willing for him to ask the question, but I don't want him to say it is something he has told him. I will be glad to have him do it openly.

(There was a side-bar conference.)

The Court: They have concluded your testimony, Judge. Thank you, sir.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, v. J. WARREN DAVIS and MORGAN S. KAUFMAN.	No. 8969 March Sessions, 1941.

Before Hon. HUGH D. MCLELLAN, J. and a Jury.

August 6, 1941

JOSEPH BUFFINGTON, having been duly sworn, was examined and testified as follows:

Mr. Gahagan: May I approach here so that Judge Buffington will be able to hear me, sir?

The Court: Certainly.

DIRECT EXAMINATION BY MR. GAHAGAN:

Q. Judge Buffington, you are a retired Judge of the Circuit Court of Appeals for the Third Circuit, are you not, sir?

A. I am.

Q. Did you sit as a Judge on certain cases arising out of the Fox bankruptcy?

A. I did.

Q. Would you keep your voice up, if you can, sir? You did, you say?

A. I did.

Q. How many of such cases, sir?

A. I think four or five; four or five.

Q. Did you yourself write any of the opinions in those four or five cases on which you sat, sir?

A. I did not.

Mr. Gallagher: If your Honor please, at this point we object to any testimony of this witness, on the part of the defendant Kaufman.

The Court: The evidence is received subject to a ruling heretofore made. You may answer, if you can, Judge Buffington.

The Witness: What was the question?

Mr. Gahagan: There is no question pending, Judge Buffington. There is no question pending sir.

The Witness: All right.

By Mr. Gahagan:

Q. Would you tell the Court and the jury—can you hear me all right, sir?

A. Yes.

Mr. Gahagan: May the record note that the witness, Judge Buffington, took out of his pocket a listening device or hearing device?

By Mr. Gahagan:

Q. And I ask you, Judge Buffington, did you take that out of your pocket so that you could hear me better, sir?

A. I did.

Mr. Gahagan: May the record indicate I am standing approximately——

The Witness: What's that?

Mr. Gahagan: I am reading into the record, Judge Buffington.

May the record indicate that—this is not a question, Judge Buffington—may the record indicate that I am talking to Judge Buffington in a loud tone about four or five feet away from Judge Buffington, and also——

Mr. Gray: If your Honor thinks it is proper that the record should indicate that, all right, sir, but the jury can see everything that is going on.

The Court: Yes, they can, but I haven't any objection to the record showing whatever happens.

Mr. Gray: All right. I raise no objection.

By Mr. Gahagan:

Q. Judge Buffington, did you have that listening device —withdraw that.

When did you first purchase that listening device that you have, Judge Buffington?

A. Oh, I think about—I think that I purchased it last Spring some time.

Q. Did you have any such listening device in 1936, sir?

A. No.

Q. In 1937, sir?

A. No.

Q. In 1938, sir?

A. No. I tried——

The Court: I thought the witness said he bought it last Spring?

Mr. Gahagan: He might have had another one, sir.

The Court: All right. Why don't you ask him if he had another one instead of going all through those years?

By Mr. Gahagan:

Q. What was the condition of your hearing in the year 1936, Judge Buffington?

A. It was very bad and was deteriorating.

Mr. Gray: Mine is a little bad. What did he say, please?

The Court: "It was very bad and it was deteriorating."

By Mr. Gahagan:

Q. And could you hear out of both ears, sir?

A. No, no, I lost the hearing of my left ear in childhood. It was totally deaf. I have been dependent all through my life on the service of my right ear.

Q. And, Judge Buffington, is your hearing better now than it was in 1936, '37 or '38, with the use of the device you have?

A. Yes, it is. I tried out so many other devices, and this is the only one I found I got any satisfaction out of.

Q. Did you ever try any device when you were in court hearing cases, sir?

A. I don't remember.

Q. What is your best recollection whether you had a device in court when you were hearing cases?

A. No, I never had a device in court.

Q. You never had one?

A. I called counsel up just as I am calling you, if I couldn't hear. I asked them to come up to the Bench.

Q. Yes, sir. What was the condition of your eyesight in the beginning of 1936, sir?

A. I had been under the care of an oculist for some time, anticipating the gradual approach to an operation for a cataract. I had that operation later on.

Q. When, sir?

A. That I cannot recall. Possibly you know the date.

Q. Was it during the time that the Fox cases were before you, sir?

A. Yes.

Mr. Gray: Wait, that is objected to. If Mr. Gahagan does know the date, I haven't the slightest objection to his telling it to him, even though it is not legally admissible, but for him to say it was during the Fox cases, that is objected to as being highly improper.

The Court: I wouldn't say that it was highly improper, but it is not permissible.

The Witness: Would your Honor tell me—I couldn't hear what you said.

The Court: It was something that had nothing to do with the admissibility of testimony——

The Witness: I see.

The Court: That need not concern you, sir.

The Witness: Sir?

The Court: It was nothing that need concern you.

The Witness: Yes.

The Court: I should be sure that you heard it, if it did.

By Mr. Gahagan:

Q. Before the time of your operation, sir—could you read before the time of your operation with ordinary glasses, sir?

A. With great——

Mr. Gray: Now, just a minute, that I object to. I don't know what he means by ordinary glasses, if your Honor please. I am carrying two cataracts, I can read with ordinary glasses.

Mr. Gahagan: I object to Mr. Gray——

Mr. Gray: Just a moment, I am using this as an illustration.

The Court: The jury will disregard what counsel may say on the one side or the other as to his own physical or ocular or other infirmities.

Mr. Gray: I make the objection, if your Honor please, that the word "ordinary" glasses has no significance. No man——

The Court: That is true. If you had only said that instead of giving us your illustration.

Mr. Gray: I am trying only to give your Honor an illustration in support of my objection.

The Court: The question is not whether he could read with ordinary glasses, but the question is whether he could read.

By Mr. Gahagan:

Q. How did you read such papers as you did read in 1936, sir?

A. I read in two ways. One was I read through the ordinary glasses that were changed from time to time, as the time drew nearer for my operation, and I read by the use of a magnifying glass. And in both cases I got down close to the vision——

Q. Within about——

A. —of any reading I did in the newspaper or a book or a record.

Q. Within about four or five inches from the page, sir?

A. Yes, sir.

Q. Could you read out of both eyes, sir?

A. No. This eye, so far as—the left eye, so far as hearing, I mean as seeing was concerned was rather a hindrance than a help. It tended to confuse the sight. That is——

Q. Yes.

A. —the sight of this. In other words, if I put a cover over this left eye, I could see better than if I used both eyes.

Q. Did you at any time use a magnifying glass with your other eye, the better eye, the right eye, sir?

A. Oh, yes—well, how is that?

Q. Did you use a magnifying glass, sir?

A. Oh, yes, I used a magnifying glass.

Q. And you used one eye to look at the records and papers, sir?

A. Yes—how is that?

Q. I said, and you looked at the records and papers through that one eye, sir, is that right?

A. Through that magnifying glass.

Q. Yes, sir.

A. Or through the spectacles as they were changed from time to time.

Mr. Gahagan: May I confer? No further questions, your Honor.

By Mr. Gahagan:

Q. One question before I stop. What Judge did you rely upon, sir, in court if you relied upon any Judge?

Mr. Gray: Just a minute, that is objected to. I don't think there is any ground laid to make that question proper.

Mr. Gahagan: I will withdraw the question, sir.

By Mr. Gahagan:

Q. Did you rely upon any particular person in doing your legal work, sir?

Mr. Gray: Just a minute, I am objecting to that one, if your Honor pleases. "In doing your legal work", I think is too broad even if the rest of the question was proper.

Mr. Gahagan: May I put a period in there, your Honor? I will withdraw the question.

By Mr. Gahagan:

Q. Did you rely—I will withdraw that statement, please. Did you have any law clerk, Judge Buffington?

A. No.

Q. Was there any person upon whom you relied throughout the period 1936 through 1938 more than any other person, sir?

Mr. Gray: That is objected to. I don't know, that question certainly is not admissible in that form.

The Court: No, I think I will not receive that in that form. You have already asked him as to whether he wrote, as I remember it, the opinions arising out of the Fox bankruptcy which bore his name.

Mr. Gahagan: Yes, sir.

The Court: Have you not?

Mr. Gahagan: Yes, sir.

The Court: And he answered in the negative.

Mr. Gahagan: Yes, sir.

The Court: Have you asked him who did write those opinions?

Mr. Gray: May I interrupt, if your Honor please, and I think properly so, to say that there has been no proof with respect to those opinions as yet.

The Court: I take it there will be.

Mr. Gray: Well,——

The Court: And as to the order of proof, I think that the trial judge should have something to say.

Mr. Gray: Yes, sir, but your Honor, and I don't know whether Mr. Gahagan did, spoke of the opinions. I am not raising any question of fact about it. But right at this time there is no proof as to who wrote those opinions and no proof, if your Honor please, as to whose name appears in those opinions, and the opinions are not in evidence at all.

Mr. Gahagan: I believe that goes to the order of proof, your Honor.

Mr. Gray: Well,——

The Court: Yes. I am saying nothing more at this time. You can pursue your inquiries.

By Mr. Gahagan:

Q. Did you rely upon anyone as your eye or ear in court, sir?

Mr. Gray: That is objected to.

The Court: I will exclude that in that form.

By Mr. Gahagan:

Q. Who wrote the opinions, if you know, Judge Buffington?

Mr. Gray: Now, wait a minute.

By Mr. Gahagan:

Q. The five Fox opinions, the four or five Fox opinions arising out of the Fox bankruptcy, sir?

Mr. Gray: It is still objected to in the present state of the record.

The Court: I receive it and save the exception of each defendant.

Mr. Gray: Your Honor grants me an exception.

The Witness: How was that?

By Mr. Gahagan:

Q. Who wrote the Fox opinions, sir, if you know?
A. Well, I know I did not, and I know Judge Thompson who sat in it did not. Who wrote the opinions, I did not see them written, and I can't say that.

Mr. Gahagan: All right, sir. That is a sufficient answer, your Honor.

The Court: Well, what other Judge sat on it? Ask him that.

By Mr. Gahagan:

Q. What other Judge sat on those cases with you?
A. Judge Thompson, Judge Davis and I.

Mr. Gahagan: No further questions.

Cross-examination by Mr. Gray:

Q. Judge Buffington, you were appointed to the Circuit Court of Appeals in what year?
A. Mr. Gray, would you mind standing here?
Q. Yes, all right.
A. Thank you.
Q. You were appointed to the Circuit Court of Appeals in what year?
A. 1892.
Q. And you became the senior Circuit Judge in what year?
A. That I could not say, but I would judge, oh, probably sometime like fifteen years or so after I was appointed District Judge.
Q. And the senior Circuit Judge is the one who assigns the judge to write the opinions, does he not?
A. Yes.

Q. And how long did you continue to be the senior Circuit Judge?

A. Until my retirement. I don't know just when that was. You know, probably.

Q. Well, I do, Judge, but was it not in the middle of 1938?

A. I should judge so.

Q. And even after your retirement you still continued to sit, though you did not act as senior Circuit Judge that is correct, isn't it?

A. Yes, I was called upon by the senior Circuit Judge to sit.

Q. And the senior Circuit Judge who succeeded you was Judge Davis?

A. Yes.

Q. Judge J. Warren Davis?

A. Yes.

Q. And you sat up until about what time, Judge, constantly, continuously?

A. Oh, no, I did not sit continuously.

Q. All right.

A. I sat when I was requested to.

Q. Yes. I want to ask you about the system and practice which was observed in connection with the decision of cases when you were the senior Circuit Judge. I ask you whether the practice wasn't this: That when you left the bench, you and your associate judges, each one took with him the usual printed copies of record and briefs in each case; that there was no discussion between the judges until you met for consultation, and that when you met for consultation the junior judge was not called upon first to give his thoughts and judgment about the opinion; the other judge, who was between the junior and the senior, called upon next to do so, and finally the senior judge gave his opinion, and then if they were all in accord, the senior

judge then assigned somebody to write the opinion, isn't that correct?

A. In a general way that's right.

Q. Yes. And, of course, if one judge differed in opinion from the other two, he was either converted to the majority before you left, or if he felt like it, wrote a dissenting opinion?

A. Yes, that's right.

Q. Judge, your hearing and your sight have grown progressively worse in the last five years, have they not?

A. They have.

Q. You used, did you not, in order to aid your reading a sliding magnifying glass?

A. Well, I had a glass—I regret to say it disappeared, mislaid—I had a glass, not in the usual shape of a rounded glass, but a kind of a lengthwise glass that slid, I slid it over——

Q. It was in a frame structure, wasn't it?

A. No, there was no frame in it. Well, yes, there was some frame in, that's right.

Q. You could slide it backward and forward so that you could get a number of lines on the page at one time?

A. Well, I would not say a number of lines, but I got lines on the page.

Q. It was also the practice of the judges of the Circuit Court of Appeals, when a judge wrote an opinion to send that opinion around to the other judges to inquire whether there were any suggestions with respect to its form; that is, having once agreed on whether you were going to affirm or reverse, and having assigned a judge to write an opinion, after that opinion was written, it was sent to the other judges for any suggestions, wasn't it?

A. Now, let me think about that. State that again. You are stating a general——

Q. Yes. After an opinion in the case was written, it was sent to the other judges in the court for their suggestions, was it not?

A. If I wrote the opinion, I sent it to the other judges for—to let them know what my opinion was, whether they could agree to it or suggest any changes.

Q. Yes.

A. Yes.

Q. Sometimes that would be done with an accompanying letter, would it not?

A. Yes.

Q. You were definitely able to listen to arguments, to give them consideration, to discuss them with your colleagues and to write opinions in 1936, 1937 and 1938, were you not?

A. I was greatly helped by the conference notes that all of the judges with whom I sat, older and younger, were able to give me. I, in conference, I could not hear those notes read, so my practice was, my practice, I moved my chair over and got near the person who was reading, and I was greatly helped by them. In some cases, Mr. Gray, my lack of hearing was such that I left the bench without really the information that I ought to have had. I had to dig it out.

Q. Well, you got that afterwards?

A. I had to dig it out as best I could afterwards. My brother judges, all of them, were very solicitous to me, and I remember of no cases of any great weight that were assigned or expected me to write the opinions in.

Q. Do you know, Judge, on how many occasions you appeared on the bench listening to arguments in 1936?

A. No, but I appeared whenever—in a great many, I know that.

Q. If I told you that the record—that is, the Clerk's minutes show that you appeared on sixty occasions, would you say that was approximately correct?

A. I would take the Clerk's record as being proper evidence of that fact.

Q. But you don't remember yourself?

A. No, I don't remember.

Q. Would you make——

The Court: Mr. Gray.

Mr. Gray: I beg your Honor's pardon.

The Court: Will you tell us what you mean in your question by occasions?

The Witness: Judge, will you——

The Court: I am asking Mr. Gray to state, if he will, and there is no objection to it, what he means by occasions; whether he means days or cases, and clear that up with the witness.

Mr. Gray: I will do it in that way, sir.

By Mr. Gray:

Q. By occasions, Judge, I mean the different days that you sat. You would say, and the only thing, seemingly, he can answer me is, that whatever the Clerk's records shows, is correct.

A. I presume so.

Q. Yes. Now, in order to clear practice up here; when the Circuit Court of Appeals would sit for the purpose of hearing arguments, the Clerk was the one who assigned the cases usually, was he not?

A. Assigned, how do you mean?

Q. Assigned them, listed them in their order for argument.

A. Oh, yes, the Clerk did that.

Q. So that on one day you might have either one case or two or three or four cases argued? That's right, isn't it?

A. Well, hardly four.

Q. Hardly four, all right. If I told you that the Clerk's records and the records of the reports of the Circuit Court of Appeals for the year 1936 show that you yourself filed eighty-nine opinions covering one hundred and twenty-nine cases, would you say that was right?

A. I should say that I filed oh—a great many per curiam cases that there was really no dispute about.

Q. Yes.

Mr. Gahagan: Would the Court explain what per curiam is to the jury, sir.

The Court: Yes, I will.

The Witness: How is that, Judge?

The Court: They want me to explain what a per curiam opinion is, and I am going to try and do it.

The Witness: Oh, excuse me for using that phrase.

The Court: When a case goes to an appellate court, such as the Court of Appeals, and three judges sit, the case may be of such a character that an opinion is written by one of the judges and concurred in by the other two. It is not requisite, however, in order that that decision or opinion may stand as the decision of the Court that the other two shall assent to the opinion. It is sufficient if one other assents, because in appellate courts like the Court of Appeals, it is the majority that governs.

Sometimes a case is of such a character, so clear in the minds of the Court, or there may be some other reason why, instead of one judge writing an opinion, the Court decides together to decide it and have no name appear in connection with the opinion. When that kind of an opinion, which is usually a short one, appears in the reports, it is called a per curiam opinion, and instead of the name of the judge who wrote it appearing before the opinion, the words "per curiam" appear. The words "per curiam" mean "By the Court."

Mr. Gray: I haven't any objection to the request for instructions, but I am talking about cases that were signed by him, sir.

By Mr. Gray:

Q. I ask you, Judge, whether or not in 1936, you didn't file——

Mr. Gray: May I say to your Honor when I say signed, it is a habit of this Court to sign opinions, but the name appears at the top. They are not actually signed with pen and ink.

The Court: I didn't understand you to say they were.

Mr. Gray: No, sir, but I wanted to say that because I used the expression a minute ago as I did.

By Mr. Gray:

Q. What I want to know, Judge, is whether you didn't write—and I am talking about per curiam opinions—in 1936, 89 opinions covering 129 cases?

A. If the record shows that, that is a fact.

Q. I can't answer you as to that now. If I tell you that the clerk's minutes show that you spent 76 different days in Court in 1937 hearing arguments, would you say that was correct?

A. I assume that to be correct, if the records show that fact.

Q. Would your recollection be that you were there that many days, or don't you have any recollection now on the subject?

A. I don't have any recollection.

Q. If I told you that the clerk's records show that you sat 64 days in the Court in 1938 and filed 46 opinions covering 54 cases, would you say that was correct?

A. Yes.

Q. Or have you no recollection?

A. I have no recollection.

Q. Is your recollection accurate, Judge, that you did not, yourself, write three of those opinions in what has been called the Fox cases?

A. How is that question?

Q. Is your recollection accurate when you say you wrote none of the opinions in the Fox cases? Is it not a fact that you wrote three of them?

A. I don't think so. I would say I did not.

Q. You mean that your memory is such that you can tell us now that you did not write any of those opinions?

A. No, I have a recollection that I did not.

Q. All right. When did you see those opinions last, Judge?

A. Last?

Q. Yes.

A. At the last trial.

Q. Were the opinions showed you at the last trial?

A. Yes.

Q. Or outside of the courtroom?

A. Oh, I think my attention was called to them here in Court by the District Attorney.

Q. All right.

A. Or the prosecuting attorney.

Q. All right. You remember, of course, the Court consulting about the cases?

A. I do not. I have no recollection on that subject. My mind is somewhat treacherous.

Q. Do you remember the opinions, themselves, the points of law that were involved, and the decisions that were reached?

A. Some of them I do.

Q. Were they good law?

Mr. Gahagan: I object to that.

The Court: That is excluded.

Mr. Gray: I ask your Honor to grant me an exception to that.

The Court: That is excluded on the authority of an opinion by Mr. Justice Sutherland, concurred in by the present Chief Justice Stone, and by Judge Clark. I say that for the purpose of the record.

Mr. Gray: Yes, sir.

The Court: The exception of each defendant may be noted.

By Mr. Gray:

Q. Did you join in the opinions that were filed in those so-called Fox cases?

A. I adopted the opinion that Judge Davis wrote.

Q. You were familiar with the opinions?

A. How is that?

Q. You were familiar with the opinions?

A. I presume so. I have no recollection about discussions, or what took place. I am sorry to say that I have no recollection on the subject.

Mr. Gray: I will have to ask your Honor to see you at sidebar with respect to this.

(Sidebar discussion off the record.)

The Court: In order to give counsel an opportunity to look over a record, and in order to take a little recess ourselves, we will have a recess now for 15 minutes.

(Recess at 11:30 o'clock A. M.)

JOSEPH BUFFINGTON, resumed.

CROSS-EXAMINATION (CONTINUED) BY MR. GRAY:

Q. Judge Buffington, you remember testifying at the previous trial of this case, do you not?

A. I did.

Q. And do you remember that just before the trial Mr. Gahagan gave you all these opinions to read?

A. Yes.

Q. And you read them, didn't you?

A. I had my secretary read them to me, and I read them through her, yes.

Q. All right, I won't ask you about that. You had been on the Bench with Judge Davis in the same Court since 1920, had you not?

A. 1920?

Q. Yes; that is to say, you were there before, but he came there in 1920.

A. Yes, I have been with him all his judicial career.

Q. All his time on the Bench. With respect to these opinions in the so-called Fox cases, Judge, don't you remember that you gave them all consideration and joined in them?

A. I have no recollection on the subject, Mr. Gray. I regret to say that in these few months my memory has failed me sadly.

Q. You mean that it has grown somewhat worse even since May of this year?

A. Oh, yes.

Q. To refresh your recollection, I want to read you a statement that you made——

Mr. Gahagan: Before he reads the statement, I think it would be advisable, in view of the conference at sidebar, to see what he is going to read, sir.

Mr. Gray: Do you think I will violate what I said I will do?

Mr. Gahagan: I still want to see it at sidebar, sir.

Mr. Gray: All right.

(The following transpired at sidebar:)

Mr. Gray: I desire to ask this witness, who has indicated that even since the last trial in May of this year, that his memory has deteriorated, whether at that trial he didn't say:

> "In saying I did not write these opinions, I don't want anyone to have the impression I did not agree and approve of those opinions."

And then to follow that up by asking him whether or not, especially if he concedes he did say that at the last trial, his recollection having been refreshed he doesn't remember that he took part in these conferences to reach a conclusion about these opinions.

If your Honor wants me to add to that—I might as well cover it—I am going to also refer to another part of his examination on page 950—the other was on page 939—in which I asked him this question:

> "Q. I take it that the suggestion in Mr. Gahagan's question is that you didn't know anything about these opinions. You did know all about them? You gave them consideration, and whether you wrote them or did not write them, you joined in them, didn't you?
>
> A. Yes, and I regarded them as good law."

But in view of your Honor's ruling, I was only going to quote that word, "Yes," and let out the expression of opinion that they were good law.

In quoting them to him I was going to ask him whether he didn't give these opinions consideration and enter into the conferences, and whether my calling that testimony to his memory, or calling it to his consideration doesn't recall to his mind that he took part in the conference and in the rendition of the opinions. It is on the same line as the other.

You see, it is argumentative, but may I say to Your Honor that, of course, as the matter now stands, here is a man who says definitely he didn't write the opinions, and then having said that, goes back to the point of his recollection and said as to any conferences or having anything to do with them, "I have no recollection of having had anything to do with them at all."

Now, surely, in the interest of justice if this man's memory has failed, and if—without putting it in detail on the record—certain matters have been called to Your Honor's attention with respect to him at the present time, as to his condition at the present time, and he answering that his memory has failed since May, he should not be permitted to take this witness stand and testify to one definite fact which, remaining up in the air, might be construed by the jury as being very harmful to us without our being permitted to develop certain things that Mr. Gahagan developed from him the last time, and which certainly should not be kept in the air, or kept out.

That is all I have to say, sir. Does Your Honor want to see this record?

The Court: Yes.

(The record was shown to the Court.)

Mr. Gray: I have no objection if Your Honor wants to see his entire testimony, not the slightest, both direct and cross.

The Court: For the purposes of the record, I should like to have it appear that the first one of the answers given by Judge Buffington at the former trial, a portion of which counsel for the defendants desire to ask Judge Buffington about, reads:

> "A. In saying I did not write these opinions, I don't want anyone to have the impression I did not agree and approve of those opinions. I did, and with all respect to the Supreme Court where they reversed us in one case, I still adhere to that, and have accepted the responsibility of it."

I do not see how the foregoing answer contradicts any of the testimony of Judge Buffington given at this trial, and so I ought not to admit it for the purpose of impeaching the witness, nor do I think that I ought to permit the foregoing answer to be read to the witness within the hearing of the jury, for the purpose of refreshing his recollection.

This is the full extent of my ruling, and that ruling is not to be construed as inhibiting the showing of his testimony to the witness and asking whether it refreshes his recollection as to such matters not heretofore ruled by me as subject to exclusion because of their immateriality. I do not propose by any ruling that I make in this connection to have it appear directly or indirectly that the decisions referred to in the indictment were correct law or incorrect law.

To that ruling as to the evidence already referred to, I save the exception of each defendant on trial.

I want to do this with as much care as is possible, so I am going now to turn to page 950. The evidence appearing on page 950 of the record of the former trial to which counsel for the defendants has referred, reads; question by Mr. Gray, counsel for Judge Davis:

"Q. I take it that the suggestion in Mr. Gahagan's question is that you didn't know anything about these opinions. You did know all about them? You gave them consideration, and whether you wrote them or did not write them, you joined in them, didn't you?

A. Yes, and I regarded them as good law.

Q. You still do?

A. I still do, bowing to the Supreme Court."

Mr. Gray: I shall leave out the last matter about good law, of course. In other words, in the question that I put to him after I give him the opportunity to read it, I shall confine myself entirely to being within Your Honor's ruling.

The Court: I make a similar ruling in connection with this evidence as I just did in connection with Judge Buffington's answer to a question at the former trial of this case, which answer has heretofore been made a part of the record.

Counsel for the defendants may not in any form of words introduce before the jury any statement made at the former trial by Judge Buffington to the effect that the opinions in question were good law.

Subject to hearing the Special Assistant to the Attorney General, who may persuade me to the contrary, I do, however, limit the ruling as to that portion of the evidence of the former trial just quoted, by saying that counsel for the defendants may, if he desires so to do, introduce that portion of the evidence at the former trial now under discussion, reading:

"You gave them (meaning the opinions referred to in the indictment) consideration, and whether you wrote them or did not write them, you joined in them, didn't you?

A. Yes."

Do you want to be heard on that, Mr. Gahagan?

Mr. Gahagan: May I, sir? In looking at the form of the question proposed on the former trial, I notice that the Government failed, and I representing the Government at that time failed in my duty to object to the form of the question, which is actually in triplicate form. It starts with a statement by counsel, and then there are, I believe, two, or perhaps three questions asked thereafter. I believe the question of whether Judge Buffington joined in the decision is one question, whether he joined in the consideration is another question, and I cannot see the testimony reading it backwards, sir; may I just look at that, sir?

(The record was shown to counsel.)

Mr. Gahagan: And a third question, which is, "You did know all about them, didn't you?" Those three questions appear to me to be asked in the former one, and reading them as such would be confusing, I believe, to the witness, and impossible to answer.

The Court: Did you understand me to rule that he could read the three of them, or did you understand me to say that he be permitted to put in that portion of the evidence at the last trial appearing on page 950, reading:

> "You gave them consideration, and whether you wrote them or did not write them, you joined in them, didn't you?
>
> A. Yes."

Didn't you understand that is what I just said?

Mr. Gahagan: I believe those are two questions, sir, and I just point it out, subject to Your Honor's overruling me on the point. I do point out that is really two questions. One is whether his name appears as one of the three judges who sat on the cases, and, two, whether he gave them consideration.

The Court: You permitted this to be answered before.

Mr. Gahagan: Yes, in error.

The Court: That he gave them consideration and joined in them. That I am going to let you have, Mr. Gray.

Mr. Gray: That your Honor means I may ask; as to the other on page 939 you have ruled that he may read them but I may not ask it of him in the presence of the jury. This I may ask.

The Court: That you may ask, and you will be careful to make no statement as to their being good law.

Mr. Gray: As to Your Honor's ruling, you will grant an exception to each defendant?

The Court: Of course, I will, Mr. Gray.

Mr. Gray: May I say to Your Honor off the record—

(Discussion off the record at sidebar.)

The Court: I want to add here for the purpose of the record that even if it were open to the defendants to show that these decisions were legally sound, that may not be shown by the testimony on cross-examination of this witness. His state of mind about that, since he isn't charged with being a co-conspirator, it seems to me would be admissible in the absence of such a decision as that of United States against Manton.

Be that as it may, let's find whether, after page 950 of the testimony at the former trial, there are any other things you desire to read.

Mr. Gray: Nothing else, sir. I am going to show him some letters showing he did actually take part in these decisions, but that has nothing to do with his prior testimony.

The Court: That is all right.

(End of sidebar conference.)

By Mr. Gray:

Q. Preliminary, Judge Buffington, to my asking you a question, I ask you to read that which I have marked in a brace on page 939 of the testimony you gave at the last trial. All I am asking you to do now, please, is to read it.

The Court: And by "read it," Mr. Gray means read it to yourself and not to the jury.

By Mr. Gray:

Q. And there are two sentences, and the particular one that I want you to pay attention to is the first one. We will get you a glass, if you will need it.

A. Mr. Gray, you mean this?

Q. I mean that paragraph, yes, within that brace.

A. All this here?

Q. Yes. You have read it?

A. I have read it.

Mr. Gray: May I be not accused of trespassing, since Mr. Gahagan wanted to put certain things on the record, if I suggest that the record show now that from a distance of at least ten or twelve inches with his present glasses and without any magnifying glass the Judge was able to read that typewritten document which I showed him, sir?

The Court: Yes, that may be done, and now you are even.

Mr. Gray: Yes, sir. I have my own judgment about how even we happen to be, sir.

By Mr. Gray:

Q. Judge, after having read that and refreshed your recollection about it, and please don't mention in answer-

ing me what it was that you read, I want to know whether or not you now do not recollect having taken part in the conferences and having approved the opinions that were filed in the so-called Fox cases?

A. I don't know that I gather what you say.

Q. Well, a few minutes ago, before we had the sidebar conference, you had said you had no recollection of the conferences that took place over the Fox case?

A. That's right.

Q. I have asked you to read something and you have read it.

A. Yes.

Q. Now, I ask you whether, having read and refreshed your recollection by something that you said the last time, you do not now recall that you did take part in the consideration of those opinions and approved of them?

A. Mr. Gray, I testified——

The Court: No, no, no.——

Mr. Gray: I tried to avoid that.

The Court: I want to be just as respectful as I can be here, but you must answer that question. It is of importance that you answer it and answer no other question.

The Witness: All right.

By Mr. Gray:

Q. My question, to repeat it, was whether, having read that testimony and having refreshed your recollection by it, you do not now recall that you did take part in the conferences and in the consideration of the opinions?

A. I do not. My memory is such that I do not remember.

Q. All right. I accept that statement.

The Court: You are not to infer, Mr. Foreman, ladies and gentlemen of the jury, that there was any such testimony as that at the last trial.

Mr. Gray: Your Honor having said that, will you say that they are not to infer that I was simply doing something out of the air?

The Court: No, Mr. Gray, no, there is no criticism of you intended or may properly be made.

By Mr. Gray:

Q. Now I ask you whether at the last trial in response to a question that was put to you and part of which I read, that is referring to the opinions, you were asked:

"You gave them consideration, and whether you wrote them or not, or did not write them, you joined in them, didn't you?

A. Yes."

Don't you remember you said that at the last trial?

A. I think I did.

Q. Yes. All right. In 1936 and 1937 and 1938 you wrote many opinions, didn't you, Judge Buffington?

A. I think so, yes.

The Court: May I inquire——

The Witness: I know I did.

The Court: May I inquire as politely as possible whether you have not gone into that?

Mr. Gray: I am not going into that any further except for one question. I will offer proof of that, if necessary, in due time.

The Court: Yes. You have asked the question.

Mr. Gray: Yes.

By Mr. Gray:

Q. You wrote many a dissenting opinion which was entirely and absolutely your own in which you did not consult or have anything to do with any other Judges, did you not?

Mr. Gahagan: That is a triple-barrelled question, first, whether he wrote any opinions; second, whether he consulted with some one else; and third, whether or not he had any help from any one else. There is considerable distinction there in the three questions.

The Court: Will you separate them?

Mr. Gray: Yes, I will separate them, but I never knew you couldn't put a question that was combined as I have there as a combined question.

The Court: I have a lot to learn. I am young and I may be able to learn.

Mr. Gray: We will not discuss that any further, sir.

By Mr. Gray:

Q. Judge Buffington, you wrote many dissenting opinions?

A. In my time?

Q. Yes.

A. Generally, you mean?

Q. Yes.

A. Oh, yes.

Q. In 1936 and 1937 you wrote them, didn't you?

A. I assume I did if you say so. I mean if the record shows it.

Mr. Gahagan: May I look over Mr. Gray's shoulder?

Mr. Gray: Sure.

The Court: Yes, you may if you want to.

By Mr. Gray:

Q. Do you remember the case of Nagle vs. O'Connor and Tobias vs. O'Connor in 1936 in which Judge Davis wrote the opinion of the Court and you wrote the dissenting opinion?

A. I don't remember the cases, unless you let me look at the book.

Q. I will be glad to. The point I want to ask, after you look at them, is whether you did not write that dissenting opinion and write it alone?

Mr. Gray: I was going to ask him another question at the same time, as I thought I should, but I am afraid of an objection.

The Court: You don't look afraid.

Mr. Gray: Not physically afraid, sir.

The Witness: Oh, I remember that case well. I wrote the dissenting opinion.

By Mr. Gray:

Q. And the Supreme Court sustained you?

The Court: I don't think we will go into that.

Mr. Gray: I want to show he could intelligently handle cases in 1937.

The Court: I am not going into the correctness or incorrectness of decisions not involved here.

Mr. Gray: This is not for the purpose of showing whether it is good law or bad law, Your Honor; what I want to show is, when the suggestion is made that through 1936 and 1937——

Mr. Gahagan: I object to the rehearsal of Mr. Gray. It speaks for itself.

Mr. Gray: Oh, well——

The Court: Just stop your talking.

By Mr. Gray:

Q. I show you a document which I shall ask the stenographer to mark as D-1, only for purpose of identification, sir, because I want to identify the paper I am showing to him.

Mr. Gahagan: You may put it in evidence, if you want.

Mr. Gray: I ask that that be stricken from the record. He has no right to suggest anything of the kind.

Mr. Gahagan: I have no objection.

The Court: Don't ask for anything. You may proceed to ask your question of this witness.

Mr. Gray: Will you mark this D-1?

(Letter dated March 9, 1938, from Judge Buffington to Judge Davis, was marked D-1.)

By Mr. Gray:

Q. I ask you, Judge Buffington, whether that is your signature?

A. That is my signature.

Q. You were just able to read the letter, weren't you, just this moment?

A. How is that?

Q. You read the letter, didn't you?

A. Yes.

Q. In view of the contents of that letter, do you still say you didn't have anything to do with, or that you do not recollect giving any of these decisions consideration?

A. Mr. Gray, I want to tell you this, as far as my memory is concerned, I received a dreadful shock from the opera-

tion for cataract as well as anxiety about my hearing. My recollection today is not what it was three months ago. That is my signature.

Q. You don't have any recollection?

A. I don't have any recollection.

Mr. Gray: That's all right. That's all I want to ask you.

Mr. Gahagan: May I see that?

Mr. Gray: You may see that.

REDIRECT EXAMINATION BY MR. GAHAGAN:

Q. Now, Judge Buffington——

The Court: Have you finished your examination?

Mr. Gray: I have finished, in view of what the Judge said; I don't want to go any further.

The Court: Any of you other gentlemen wish to ask any questions?

Mr. Gallagher: No.

By Mr. Gahagan:

Q. Judge Buffington, is your eyesight better today than it was before your operation, sir?

A. Oh, yes, this thing has been a great relief to me, this mechanism.

Q. And those special glasses that you have had made now, sir?

A. Yes, sir, I had those made in Rochester, New York. They are not the ordinary glasses, they are powerful glasses. That was made under my oculist's direction.

Q. And you had a cataract removed from——

A. From my right eye, with the prospect of having another operation for this one. I have been under a great strain.

Q. Yes, sir. Before the last trial did your secretary not read you the Fox opinions, sir?

Mr. Gray: If Your Honor pleases, that is objected to. It is leading and it is not redirect.

The Court: And not only that, but that already appears.

Mr. Gahagan: They said——

The Court: That's what he said. I wouldn't know it if he had not said it, I haven't read the record of the last trial.

By Mr. Gahagan:

Q. Judge Buffington, you said this was your signature?

A. That's my signature.

Q. This is a letter written to Judge Davis, sir? Can you see that?

A. Yes.

Q. It refers to All Continent Corporation v. Steelman, trustee opinion?

A. It does.

Mr. Gahagan: The Government offers this exhibit in evidence, Your Honor.

Mr. Gray: I have no objection.

Mr. Gahagan: Government's Exhibit 51.

(The letter previously marked D-1 was marked Government's Exhibit No. 51 in evidence.)

Mr. Gahagan: May I read it?

The Court: Yes, but may I understand what is going on? Is that the same letter that Mr. Gray had marked for identification?

Mr. Gahagan: Yes, sir.

Mr. Gray: He has not referred to it as D-1, but the record may show that.

Mr. Gahagan: Will the record please show that Defendants' Exhibit D-1 for Identification is now Government's Exhibit 51 in evidence?

May I read the letter to the jury?

The Court: Yes.

Mr. Gahagan:

"UNITED STATES CIRCUIT COURT OF APPEALS
THIRD JUDICIAL CIRCUIT
PHILADELPHIA

Chambers of
Judge Buffington

March 9, 1938.

Honorable J. Warren Davis,
United States Circuit Court Judge,
Trenton, New Jersey.

My dear Judge:

I have gone over the enclosed (All Continent Corporation vs. Steelman, trustee, etc.) carefully and have no suggestions to make.

Very cordially yours,

Enc. (Signed) JOSEPH BUFFINGTON."

By Mr. Gahagan:

Q. I presume that means enclosure, does it not, sir?

The Court: It's on there——

Mr. Gahagan: No further questions.

The Court: I know what it is.

Mr. Gahagan: I didn't want to say it, Your Honor.

Mr. Gray: I have some other matters, but I want to relieve Judge Buffington in view of the continued examination——

Mr. Gahagan: I have only one question, sir.

The Court: You may ask it.

By Mr. Gahagan:

Q. Judge Buffington, would I refresh your recollection by asking you whether the operation on your eye did not take place in the year 1939, sir?

A. I don't remember when it was.

Q. The records would show?

A. The records would show it.

Q. Who was your eye doctor, sir?

A. Dr. Weber.

Mr. Gahagan: Thank you, sir.

The Witness: At the Aldine Hospital, the Widener-Elkins Hospital.

Mr. Gahagan: Thank you.

The Witness: I was three months without being able to read or write, I think.

Mr. Gahagan: Thank you, Judge Buffington.

Mr. Gray: Are you through now?

Mr. Gahagan: Yes, sir.

Mr. Gray: I want to relieve Judge Buffington, but he has opened up the door, and I have got to cover it.

Do you want to see another document I am going to hand him?

I gave it to him to look at before I show it to the witness, not to study.

Mr. Gahagan: I think this letter needs studying.

The Court: He may take his time, all the time he wants.

Mr. Gahagan: May I show it to the Court?

Mr. Gray: I haven't shown it to the witness yet, but I have no objection to Your Honor seeing it. I just showed it to him as a courtesy before I showed it to the witness; I have no objection to Your Honor seeing it.

The Court: If you have, I don't want to see it.

Mr. Gray: I have no objection.

The Court: I have got to see it some time.

Mr. Gray: Will you mark this D-2?

(A paper was marked D-2.)

RECROSS-EXAMINATION BY MR. GRAY:

Q. I show you a document, Judge, which purports to be a carbon copy of a letter. It is marked D-2. I ask you whether you recollect receiving the original of which that is a carbon?

A. I have no doubt I received——

The Court: No, the question is this, whether you recollect receiving the original of that letter.

The Witness: I do not recollect receiving the original.

By Mr. Gray:

Q. You would not say, of course, you did not receive it in due course at your office?

The Court: Your recollection is called for. Have you any recollection upon the subject?

The Witness: No.

Mr. Gray: None whatever. All right, sir.

Mr. Gahagan: May I ask whether that last copy has been marked, Your Honor?

Mr. Gray: Oh, yes, it's been marked.

The Court: For identification.

Mr. Gahagan: Yes, for identification.

Mr. Gray: Now I am going to show him another.

The Court: I am not receiving that paper as an exhibit yet.

Mr. Gray: Oh, I can't offer that exhibit, I can't offer it without offering further proof with respect to it. That, I recognize.

Mr. Gahagan: This one is only a half a letter.

Mr. Gray: Maybe it is only a half a letter, I don't know.

Mr. Gahagan: It stops right in the middle of a sentence. If you show him anything I think you ought to show him the rest of the letter.

Mr. Gray: If I have it. There are only a few lines in the letter that have anything to do with this matter, the rest is on other matters.

Mr. Gahagan: You may show that.

Mr. Gray: I ask that this be marked D-3, with Your Honor's permission.

The Court: For identification, yes, sir.

Mr. Gray: For identification only.

(Two papers were marked D-3.)

By Mr. Gray:

Q. I ask you first on August 22, 1938, or the middle of August, Judge Davis was then the Senior Circuit Judge and he assigned the writing of opinions to the other Judges, that is correct, isn't it?

A. I assume it is correct, yes.

Q. I call your attention to a letter as of that date, August 22nd, or rather, a carbon copy of a letter addressed to you, and ask you whether or not you received the original of that letter?

The Court: Whether he recollects receiving it?

Mr. Gray: Yes, whether he recollects receiving it.

The Court: Whether you recollect receiving it.

The Witness: I have no recollection.

Mr. Gray: No recollection. All right, that is all, thank you, Judge. That is all, thank you.

The Court: Anything further?

Judge Buffington, I take it they have asked us all the questions they want to.

The Witness: I would like to ask Mr. Gray and counsel to come here a moment.

Mr. Gray: I have no objection to that.

Mr. Gahagan: I would rather have it——

The Court: Judge Buffington, if you desire to take up something with counsel, it should not be done in the court room.

The Witness: No, I want to know whether I should stay here or go to Atlantic City for a rest.

The Court: I will say to you go to Atlantic City by all means.

The Witness: All right.

The Court: Of course, when I said that I assumed we could get him back if we wanted him.

Mr. Gray: That's all right.

Mr. Gahagan: I have another witness if you want me to start with him. He is here in the court room, Mr. Brown, if you want me to start and use up the five minutes we have remaining.

The Court: If you didn't have him I might want him, but we are going to luncheon and come back at a quarter past two, if you will, ladies and gentlemen of the jury.

(Recess from 12:55 o'clock P. M. to 2:15 o'clock P. M.)